ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

No. _____

EDWARD SOLDAL, et al.,

Plaintiff-Petitioner,

vs.

COUNTY OF COOK, et al.,

Defendant-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED FOR REVIEW

1. Whether deputy sheriffs who participated in unreasonably seizing the plaintiffs' home are liable in a civil action for violation of the plaintiffs' Fourth Amendment rights?

2. Whether deputy sheriffs who participated in extensively damaging the plaintiffs' home are liable in a civil action for violation of the plaintiffs' Fourteenth Amendment right to substantive due process?

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STATEMENTS UNDER RULE 21

Rule 21(b) The parties to the proceeding in the court below were Edward and Mary Soldal and their children Jimmy, Alena, Joseph and Jessie; Cook County Deputy sheriffs Chief Wittsman, Captain Jackson, Captain Levy, Lieutenant Jones, Officer Haritos, Officer Hunt, Officer Vaid, Officer Doe and Officer Poe; Jeffrey Peterson, Margaret Hale, Margaret Celeski and Kimberly Giovanni.

Rule 21(d) The en banc decision of the Court of Appeals is reported at 942 F.2d 1073. The panel decision of the Court of Appeals is reported at 923 F.2d 1241. The decision of the District Court is unreported.

Rule 21(e) Jurisdiction of this court is invoked pursuant to this Court's power to review a final decision of a United States Court of Appeals.

(i) and (ii) The en banc decision of the Court of Appeals was dated August 27, 1991. The panel decision of the Court of Appeals was dated January 24, 1991.

(iv) Jurisdiction is conferred on this court by 28 U.S.C. §1254.

(f)(i) Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

(ii) 42 U.S.C. §1983 (1981):

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or

> causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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STATEMENT OF THE CASE

This is a civil action brought pursuant to the Civil Rights Act, 42 U.S.C. §1983, and state law by plaintiffs Edward and Mary Soldal and their minor children Jimmy, Alena, Joseph and Jessie. The ten count complaint[1] alleged that Cook County deputy sheriffs

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[1]The various counts of the complaint were as follows:

1. 42 U.S.C. §1983 claim re: September 4, 1987 seizure of plaintiffs' home and destruction of and damage to their property;

2. 42 U.S.C. §1983 claim re: September 5, 1987 arrest of Edward Soldal;

3. 42 U.S.C. §1983 claim re: October 11, 1987 arrest of Edward Soldal;

4. 42 U.S.C. §1983 policy claim against the County of Cook.

and private parties violated the plaintiffs' constitutional and state law rights by seizing and removing their trailer home from a mobile home park, destroying and damaging their property, and arresting plaintiff Edward Soldal on two separate occasions. This petition for certiorari addresses only Count I of the complaint - the 42 U.S.C. §1983 action for seizure of plaintiffs' home.

In the District Court defendant deputy sheriffs and two individuals moved for summary judgment on the grounds, inter alia, that the private parties, not the deputy sheriffs, seized and removed the plaintiffs' home, and that the facts did not support a finding of conspiracy or joint action between the private citizens and the deputy sheriffs. Therefore, these defendants argued, the seizure of the home was not state action and §1983 was inapplicable. (R.38)[2] The district court accepted this argument, granted the motion, and entered judgment in favor of all defendants on all counts. (R.67, Appendix C)

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5. Pendent state claim re: September 5, 1987 arrest and imprisonment.

6. Pendent state claim re: October 11, 1987 arrest and imprisonment.

7. Pendent state malicious prosecution claims arising out of September 5, and October 11, 1987 arrests.

8. Pendent state claim for intentional infliction of emotional distress.

9. Pendent state conspiracy claim.

10. Pendent state respondeat superior claim against Cook County.

[2]References denoted "R._" are to the docket sheet.

Plaintiffs appealed to the United States Court of Appeals for the Seventh Circuit, arguing that the facts did show sufficient joint action to sustain the §1983 claim. The panel opinion (923 F.2d 1242 (7th Cir. 1991)) accepted plaintiffs' argument on this issue, but the majority held that this aspect of the plaintiffs' complaint should nevertheless be dismissed because the seizure of the plaintiffs' home did not violate any of their constitutional rights.[3] In dissent, Judge Flaum argued that plaintiffs' complaint and evidence set forth violations of both their Fourth Amendment right to be free from unreasonable seizures and their Fourteenth Amendment right to substantive due process.

Plaintiffs sought rehearing and the Court vacated the panel decision and granted rehearing en banc. (931 F.2d 445) The case was reargued and in a 6-5 decision the court reaffirmed the panel decision, elaborated on its holding that there was no Fourth Amendment violation, and reinstated the panel opinion in all other respects. 942 F.2d 1073 (7th Cir. 1991) In dissent, Judge Flaum, writing for the five member minority, argued that plaintiffs had set forth a Fourth Amendment violation and the case should be remanded to the District Court for trial.[4]

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[3]The court reversed and remanded other aspects of plaintiff Edward Soldal's claims which are not at issue here.

[4]Judge Flaum also persisted in his position that the plaintiffs had set forth a Fourteenth Amendment substantive due process claim "but the original panel majority chose not to address it." 942 F.2d at 1088 n.7

FACTS[5]

In March, 1985 plaintiffs Edward and Mary Soldal moved to Willoway Terrace mobile home park in Elk Grove Village, Illinois, where they lived in a mobile home they owned, together with their children, plaintiffs Jimmy, Alena and, after their birth in 1986, Joseph and Jessie. In May, 1987 defendants Terrace Properties Inc., the owner of Willoway Terrace, and Margaret Hale, the manager of Willoway Terrace, filed an eviction proceeding against the plaintiffs in the Circuit Court of Cook County seeking to evict plaintiffs from their plot. This suit was dismissed on June 2, 1987. (R. 56, Attachment A) Under Illinois law a tenant of a mobile home park has the right to renew his lease unless the park owner proves specific grounds for non-renewal, "such as violation of park rules, health and safety code or irregular or non-payment of rent." Ill. Rev. Stat. Ch. 80 §208

In August, 1987 Terrace Properties Inc. and Hale filed another eviction proceeding against the plaintiffs seeking possession of their lot but claiming no unpaid rent. The case was set for trial on September 22, 1987. (R.56, Attachment B) On September 4, 1987, Terrace Properties Inc. and Hale contacted the Cook County Sheriff's Department and informed the department that they were about to physically evict a tenant, the Soldals, and requested the presence of Cook County Sheriff deputies because they expected that

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[5]Since this case is on appeal from the grant of summary judgment the facts are taken from the affidavits and papers before the District Court with all factual inferences taken against the moving party and in favor of the opposing party. Adickes v. Kress and Co., 398 U.S. 144, 158-59 (1970)

the plaintiffs might try to resist the eviction. (R 56, Statement of Facts ¶ 7; R. 56, Attachment C) The Cook County Sheriff's Department agreed to send deputy sheriffs to the mobile home park to ensure that the moving of the mobile home was accomplished without any incidents. (R. 56, Statement of Facts ¶ 9; R. 56, Attachment C)

At about 1:00 p.m. on September 4, 1987 two employees of defendant Terrace Properties Inc. (hereafter called Willoway employees) arrived at the plaintiffs' home with their tools and Cook County deputy Sheriff Shawn O'Neill.[6] (R.56, Statement of Facts ¶ 10; R. 56, Attachment C; R. 56, Attachment E, p. 12-15). Deputy O'Neill had been ordered to the scene by Cook County Sheriff's Captain Jackson pursuant to the request from Terrace Properties Inc. and Hale for assistance in evicting the plaintiffs. (R.56, Attachment C) Deputy Sheriff O'Neill parked his car in the street outside the mobile home while the Willoway employees began pounding on the trailer (R.56, Attachment E, p. 13) and "started to tear our place apart. . .Yanking the sewer box, the water box off the side of the trailer." (R.56, Attachment E, p. 15)

When Edward Soldal asked the Willoway employees "What are you doing?" one employee "said to ask the sheriff deputy" and continued "ripping our trailer apart." (R.56, Attachment E, p. 16) Mr.

[6]The name of deputy sheriff O'Neill was discovered by plaintiff pursuant to discovery materials received from defendants Terrace Properties Inc. and Hale. At the time the case was dismissed as to all defendants there was a pending Motion to Amend the complaint to add O'Neill as a defendant, in place of Officer Doe. (R.46) The District court ruled that this motion was moot. (R.67)

Soldal turned around and found that deputy sheriff O'Neill had exited his car and was standing behind him. Mr. Soldal asked him "What are you going to do about this?" and O'Neill replied that "he was there to see that I didn't interfere with Willoway's workers." (R.56, Attachment E, p. 17-18) Mr. Soldal then asked "Are you just going to stand there while they destroy our home?" and the deputy answered "I'm just doing what the chief told me." (R.56, Attachment E, p. 17-18)

At the time he made these statements deputy sheriff O'Neill knew that the eviction was unlawful. (R.56, Attachment C) Mr. Soldal then took photographs of the Willoway employees taking the trailer apart while deputy O'Neill stood there, and then took a photograph of O'Neill's squad car. When he did this O'Neill threatened to sue him. (R.56, Attachment E, p. 19) Mr. Soldal then attempted to telephone his lawyer, but as the phone rang the line went dead, because it was cut. He then left his home and called from a pay phone. His lawyer contacted the sheriff's department and spoke to defendants Cook County sheriffs Chief Wittsman and Captain Levy who both claimed that the department was unaware that any deputy sheriffs were at the mobile home park. (R.56, Attachment E, p. 24) Wittsman and Levy's statements were false. (R.56, Attachment C)

Mr. Soldal then received a phone call from either Wittsman or Levy who again falsely stated that no deputy sheriffs were at the park, (R.56, Attachment E, p. 24-25), and subsequently talked again to his lawyer who told him that Levy, Wittsman and another deputy

sheriff had said they were going to put a stop to the eviction. (R.56, Attachment E, p. 25-26)

But when Mr. Soldal returned to his home he found that the Willoway employees, in the presence of deputy sheriff O'Neill, "had torn (the mobile home) almost completely apart. And they had hooked a tractor to it and was trying to yank it out of its spot. They had torn all the skirting off; they had torn down the canopy." (R.56, Attachment E, p. 26-28) Mr. Soldal then left to call his lawyer again. She made more calls to the sheriff's department and then advised Mr. Soldal to return to the trailer park and sign a complaint against Terrace Properties Inc. for criminal damage to property. (R.56, Attachment E, p. 35-37)

When Mr. Soldal returned to his home he found two more sheriffs in the area in addition to O'Neill.[7] (R.56, Attachment E, p. 38) He said he wished to file a complaint and one of the deputies, probably defendant Cook County Sheriff's deputy Hunt, told him to go see defendant Cook County deputy sheriff Lieutenant Jones who was at the Willoway office. (R.56, Attachment E, p. 38-39, 84-86) Mr. Soldal went into the Willoway office and found Lieutenant Jones meeting together with Hale and employees of Willoway. Lieutenant Jones directed Mr. Soldal to wait outside (R.56, Attachment E, p. 40-41), while he remained inside the office with Hale and the employees of Willoway for a further 20 to 30 minutes with the blinds on the office windows drawn shut. (R.56,

[7]Because of a discovery stay ordered by the District Court and the failure of the deputy sheriffs to answer discovery prior to the stay plaintiffs do not know the names of these officers.

Attachment E, p. 42)

When Jones eventually emerged from the office Mr. Soldal told him he wished to sign a complaint against Willoway. Jones said he had to talk to a district attorney and went back into the Willoway office for an additional thirty minutes. (R.56, Attachment E, p. 45) When he came out again Jones refused to allow Mr. Soldal to sign a complaint and told him that "it was between the landlord and tenant; that they were going to go ahead and continue to move out the trailer." (R.56, Attachment E, p. 46)

Mr. Soldal returned to his home and found it had suffered further serious damage. By now there were four deputy sheriffs at the scene. (R.56, Attachment E, p. 51-54) Eventually the Willoway workers managed to pull the plaintiffs' home loose and towed it onto the street. (R.56, Attachment E, p. 55-56) Mr. Soldal returned to the Willoway office where he saw Jones talking to Hale. When Jones saw Mr. Soldal he stopped talking to Hale and told him that "they were working on where they were going to put the trailer," and when Soldal said they needed the trailer for a place to sleep Jones said "they were going to set us up at the YMCA -- he thought that they were going to be setting us up at the YMCA." (R.56, Attachment E, p. 56-57) When an employee of Willoway stated that the trailer was to be put on the street Jones told him he could not do that. (R.56, Attachment E, p. 58)

Mr. Soldal then returned to his home where two deputy sheriffs were still present (R.56, Attachment E, p. 67), then returned to the Willoway office where he saw Hale and Jones, who were again

talking together. (R.56, Attachment E., p. 68) Mr. Soldal asked Jones where his home was going to be and Jones stated "that they were going to move the trailer and work out some place to stay. He said, either the YMCA or a motel or something he said. . .He just said, you know, to get your children together and, you know, leave the park." (R.56, Attachment E, p. 69-70) Hale then looked at Jones and said "I'm going to tell him this in front of you, that he's not allowed to come back in the park," and Jones said to Mr. Soldal, "Now, you heard what she said." (R.56, Attachment E, p. 70-71) Jones then told Mr. Soldal that he would let him know where he would be staying, (R.56, Attachment E, p. 71), and later told him that deputy sheriff Hunt would escort the Soldals to a motel, and that his trailer would be at a construction company on Oakton and Busse. (R.56, Attachment E, p. 80, 91)

Deputy sheriff Hunt then instructed Mr. Soldal to follow him in his car, and drove 8 to 10 miles to a motel. Hunt went into the motel and asked if there were reservations for the Soldals. (R.56, Attachment E, p. 86-89) Mr. and Mrs. Soldal and their twin babies stayed at the motel that night, while their two older children stayed the night with friends at Willoway pursuant to an agreement with the friends whereby the Soldals were to pick up the children in the morning. (R.56, Attachment E, p. 93, 101)

That night Mr. Soldal attempted to file a complaint that his trailer had been taken and locked up by Willoway. Defendant deputy sheriff Vaid came to see Mr. Soldal, stated "You're the guy that had the trailer pulled out of Willoway today" and refused to let

Mr. Soldal file a complaint. (R.56, Attachment E, p. 128-135) Throughout the entire incident on September 4, 1987 Chief Wittsman, Captain Jackson, Captain Levy, Lieutenant Jones, Officer Hunt, Officer O'Neill and the unidentified deputy sheriffs knew that the plaintiffs had the legal right to remain at Willoway and knew that there was no order authorizing their eviction. (R.56, Attachment C; R.56, Attachment E, p. 25-26, 35-37)

On September 5, 1987 at approximately 8:00 a.m. Mr. Soldal returned to Willoway to pick up his children from his friends' house, pursuant to his prior agreement with those friends. On his way into the park he saw Hale. (R.56, Attachment E, p. 101) While Mr. Soldal was at his friends' house getting his children defendant deputy sheriff Haritos came to the door, said "You're not supposed to be here," arrested and handcuffed Mr. Soldal and told Mr. Soldal's children that their father was going to jail and they were going to a foster home. (R.56, Attachment E, p. 103-107) Shortly thereafter deputy sheriff Hunt arrived in a squad car with Hale, and Haritos went to talk to them while Mr. Soldal and his children were placed in a squad car. (R.56, Attachment E, p. 108-109)

Haritos then drove the squad car to the Willoway office and went into the office with Hunt and Hale, while Mr. Soldal was left, handcuffed, in the squad car with his two children, for about an hour. (R.56, Attachment E, p. 110-111) After an hour Hunt emerged from the office and said he was taking the children to the motel and Mr. Soldal to jail. (R.56, Attachment E, p. 112) Mr. Soldal was then taken to Maywood and jailed for about four hours.

On September 9, 1987 Judge Sophia H. Hall of the Circuit Court of Cook County found that Terrace Properties Inc. "without following the requirements of the forcible entry and detainer statute and without any other authority forcibly removed plaintiff's trailer from defendant's lot 24 on September 4, 1987, after disconnecting plaintiff's utilities" and entered an Order requiring Terrace Properties Inc. to return the plaintiffs' home to its original location. (R.56, Attachment D) Eventually, the home was returned, though in a badly damaged condition. Mr. Soldal attempted to file a criminal complaint based on the extensive damage to it but deputy sheriff Vaid refused to allow Mr. Soldal to file a complaint. (R.56, Attachment E, p. 136-137)

On October 11, 1987 Officer Vaid arrested Edward Soldal after defendant Jeffrey Peterson said he wanted to press criminal assault charges against him. (R.39, Edward Soldal deposition, p. 172) At the same time Vaid also arrested Mr. Soldal for alleged assaults on defendants Celeski and Giovanni.[8]

All criminal charges against Mr. Soldal were subsequently dismissed.

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[8]The Seventh Circuit reversed the District Court's dismissal of Edward Soldal's constitutional and state law false arrest and imprisonment claims for the September 5 and October 11 arrests. Plaintiffs do not seek review of that portion of the Seventh Circuit's order.

ARGUMENT

I. The Seventh Circuit's holding that the seizure of plaintiffs' home by deputy sheriffs did not violate plaintiffs' Fourth Amendment rights is an unprecedented limitation on the scope of the Fourth Amendment, fails to protect the right to be let alone in one's own home and the right to possess property, and is in conflict with numerous prior decisions of this Court.

The opinion of the en banc majority of the Court of Appeals breaks new ground in restricting the scope of the Fourth Amendment both as to the type of conduct regulated by the amendment and the class of persons entitled to its benefits. The majority's opinion excludes the Fourth Amendment from deprivations of property, affords no protection to the privacy right of solitude in one's home, and acknowledges that its decision grants the law abiding fewer Fourth Amendment rights than the criminal. This decision will substantially limit constitutional protections against lawless conduct by government agents and fails to reflect the special protection the Fourth Amendment has historically afforded the home. Because the decision adopts a view of the Fourth Amendment that is completely at odds with established precedent of this court and other Circuit Courts of Appeals it should be reviewed and reversed.

The en banc majority held that Fourth Amendment interests were not implicated by the seizure of the plaintiffs' home, and thus it was not necessary to take the next step and consider whether the seizure was reasonable. The opinion agreed that there was "at least in a literal sense, a 'seizure' of the home and its contents" 942 F.2d at 1076, and that this seizure could properly be laid at

the door of the deputy sheriffs because "the record...requires us...to assume that there was a conspiracy between the private and the public defendants." 942 F.2d at 1075 But the court held that this seizure by state actors did not violate the Fourth Amendment because the Soldals had state remedies which they did not use, 942 F.2d at 1075-76, "there was no invasion of the Soldals' privacy" 942 F.2d at 1077, "the Fourth Amendment does not provide a remedy for a pure deprivation of property rights" 942 F.2d at 1078, deprivation of property rights should be analyzed exclusively within a Fourteenth Amendment procedural due process framework, 942 F.2d at 1080, Fourth Amendment liberty concerns "will rarely be present outside of that (law enforcement) setting," 942 F.2d 1080, and "the law abiding have fewer rights under the Fourth Amendment than the criminal." 942 F.2d 1082. This decision fundamentally rewrites Fourth Amendment jurisprudence, contradicts numerous prior decisions of this court, and contains ominous implications for the protection of citizens from blatantly illegal conduct by state actors.

The Soldal's plight presents a classic case of where the Fourth Amendment would generally be expected to provide protections and relief against the outrageous misconduct by government agents which occurred here. Without the slightest hint of legality the plaintiffs were summarily deprived of their home, their family split up, and they were ordered to leave, and remain away from, property which it was legally theirs to occupy. They were the victims of lawless police conduct that, among other things,

disrupted their routine, invaded their property rights, and embarrassed them - the kinds of insecurity that the Fourth Amendment was intended to protect against. See R. Posner, *Rethinking the Fourth Amendment*, 1981 The Supreme Court Review 52. The en banc majority holds that the Fourth Amendment is not broad enough to provide relief for such lawlessness. As the five judge dissent eloquently points out, this holding is grievously wrong.

The sanctity of the home has long been considered a fundamental concern of the Fourth Amendment. "At the very core (of the Fourth Amendment) stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511 (1961) The very words of the Fourth Amendment command that the right of the people to be secure in their houses against unreasonable seizures shall not be violated.

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home - a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their...houses shall not be violated." Payton v. New York, 445 U.S. 573, 589 (1979)

As the dissenting opinion noted:

> ..the right to privacy a home affords its residents, whether by sheltering their possessions or their persons from government interference, has always been at the core of the fourth amendment's protections. "[T]he Court since the enactment of the Fourth Amendment has stressed 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic,'" for it is the home that, more than any other location, "provide[s] the setting for those intimate activities that the Amendment is intended to shelter from government *interference or surveillance*." Oliver v. United States, 466 U.S. 170, 178-79 (1984)

(quoting Payton v. New York, 445 U.S. 573, 601 (1980) (emphasis supplied)

942 F.2d at 1083. Though the sanctity of the Soldal's home was grossly violated and the seizure interfered with the intimate activities of their lives, the majority opinion stripped them of their Fourth Amendment protection.

The majority opinion first asserted, without citation of authority, that because the Soldals had state law remedies the court should be less inclined to find a Fourth Amendment violation. This argument was decisively rejected in Monroe v. Pape, 365 U.S. 167, 183 (1961), and this court recently reiterated that:

> overlapping state remedies are generally irrelevant to the question of a cause of action under §1983. A plaintiff, for example, may bring a §1983 action for an unlawful search and seizure despite the fact that the search and seizure violated the state's constitution or statutes, and despite the fact that there are common law remedies for trespass and conversion. Zinermon v. Burch, ___ U.S. ___, 110 S. Ct. 975, 982-83 (1990)

Moreover indexing constitutional rights to the existence of state remedies makes no sense unless the challenge is to the state remedies themselves. In the context of the Fourth Amendment the majority's holding would lead to different constitutional standards in different states. The teachings of this court have been that the Fourth Amendment applies uniformly to all the people in every state. Wolff v. Colorado, 338 U.S. 25 (1949); Mapp v. Ohio, 367 U.S. 643 (1960) The existence of state remedies is therefore irrelevant in determining whether the Soldals' Fourth Amendment rights were violated.

The majority next noted that seizures held to have violated

the Fourth Amendment have usually been seizures made in the course of public law enforcement. This is not remarkable since state officers involved in seizures will often be law enforcement officers. But the old idea that the Fourth Amendment is limited to law enforcement activities, see Frank v. Maryland, 359 U.S. 360 (1959), Easton v. Price, 364 U.S. 263 (1960) has long been discarded. Camara v. Municipal Court, 387 U.S. 523, 530 (1966); Wyman v. James, 400 U.S. 309 (1970); Michigan v. Tyler, 436 U.S. 499 (1978); Marshall v. Barlow's Inc., 436 U.S. 307 (1978); New Jersey v. T.L.O., 469 U.S. 325 (1985); O'Connor v. Ortega, 480 U.S. 709 (1987); National Treasury Employees Union v. Von Raab, 482 U.S. 902 (1987); Skinner v. Railway Labor Exec. Assn., __ U.S. __, 109 S. Ct. 1402 (1989). The Seventh Circuit gave a nod to this precedent but showed particular hostility to the Soldal's claim because the sheriffs were not investigating them for any criminal misconduct.[1]

This Court has recognized that the protection of the fourth Amendment exists apart from a person being suspected of criminal behavior. Wyman v. James, 400 U.S. 309, 317 (1970); G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) The values protected by the Fourth Amendment are violated every bit as much by a search or seizure for lay purposes as one undertaken in the course of law enforcement. It made no difference to the illicit harm suffered by

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[1]In fact, the deputies apparently claim that they did assist in the seizure as part of law enforcement since they were there to "keep the peace." Brief of Appellee Deputy Sheriffs before the Seventh Circuit, p.19.

the Soldals that the reason for seizing their home was the mere hostility of the private parties and the sheriffs rather than a seizure that occurred in the course of a criminal investigation.[16]

Only if the non-law enforcement context of this seizure is considered decisive can this case be distinguished from United States v. Place, 462 U.S. 696 (1983). In Place the court held that the Fourth Amendment applied to a seizure and detention of luggage for ninety minutes at an airport, noting that "a (warrantless) seizure of personal property is per se unreasonable within the meaning of the Fourth Amendment." 462 U.S. at 701 In determining whether the seizure was a permissible Terry type stop the court looked to the effect of the seizure and noted that it "intrudes on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary." 462 U.S. at 708 It is surely self-evident that the harm suffered by Place was minuscule compared with the disruption of the Soldal's life caused by the seizure of their home. They were suddenly cut off from the comforts and privacy of their home, their everyday belongings were taken from them, they had to find someone to take care of their children in this sudden emergency, find another place to live, travel an extensive distance to get there, stop their activities of everyday life and try to put their lives back together. This intrusion on their life was far greater than the

[16]Commentators have noted that a criminal may suffer additional harm from a search or seizure in being punished for a crime. This harm, however, is not one against which the Fourth Amendment protects. See, e.g., Posner, *Rethinking the Fourth Amendment*, 1981 Supreme Court Review 5

hardship caused by the 90 minute detention of luggage in Place or the temporary detention of packages in U.S. mail which was analyzed as a potential Fourth Amendment seizure in United States v. Van Leeuwen, 397 U.S. 249 (1970).

The majority also held that the seizure of the Soldal's home did not violate their Fourth Amendment rights because it did not violate their privacy. The opinion asserted that seizure of the home, as opposed to searching it, "did not invade the private 'space,' for solitude or secrecy that the Fourth Amendment protects. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis J., dissenting)" 942 F.2d at 1077. In fact, as the dissent pointed out, the police did not just intrude upon the Soldal's privacy, they eliminated it. 942 F.2d 1082

The seizure of the Soldal's home infringed many of the privacy interests that have long been protected by the Fourth Amendment. Because of the seizure they had nowhere to retreat to, nowhere to shelter from public scrutiny, (see United States v. On Lee, 193 F.2d 306, 315-16 (dissenting opinion), quoted in Silver v. United States, 365 U.S. 505, 511), nowhere to be secluded and enjoy physical privacy (see R. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 Supreme Court Review 175), their private papers and effects were taken from them, their mental tranquility and freedom of movement were ended (see R. Posner, *Rethinking the Fourth Amendment*, 1981 Supreme Court Review 31), they had to leave the place they called home and seek shelter elsewhere for themselves and their children. The effect of this

intrusion on the values protected by the Fourth Amendment - the "right to be let alone" Olmstead, 277 U.S. at 478 - was catastrophic, far more severe than the detention of luggage in Place, the inspections for housing code violations in Camara or the entry onto fire damaged property in Michigan v. Tyler. Though the seizure did not violate the Soldals interest in secrecy, in that the police did not examine their private effects, the Fourth Amendment protects both solitude and secrecy, and "a stronger argument can be made for extending greater protection to the right of privacy as solitude rather than as secrecy. See R. Posner, Economic Analysis of Law, 639 (3d ed. 1980)" Soldal at 1082 n. 2 (Judge Flaum, dissenting)

The majority opinion's next assertion - that the Fourth Amendment provides no remedy for pure deprivation of property rights - is contrary to several well established holdings of this Court. To use just one example, the plain view doctrine rests upon the recognition that a seizure occurring in the context of a search that does not violate Fourth Amendment privacy values must nevertheless be evaluated in light of Fourth Amendment reasonableness standards. See, e.g., Texas v. Brown, 460 U.S. 730, 738 n.4 (opinion of Rehnquist J.). In such a seizure the privacy concerns have been satisfied (if not, the search and seizure would violate the Fourth Amendment) so the seizure implicates pure property rights. Nevertheless, it must be analyzed under Fourth Amendment standards. "If an article is already in plain view, neither its observation nor its seizure would involve any invasion

of privacy. (citations omitted) A seizure of the article, however, would obviously invade the owner's possessory interest." Horton v. California, __ U.S. __, 110 S. Ct. 2301, 2306 (1990)

Moreover, in discussing seizures this Court has never required anything more than interference with possessory interests. United States v. Jacobsen, 466 U.S. 109 (1984) defined a Fourth Amendment search as "a meaningful interference with an individuals possessory interest" (466 U.S. at 113), with no requirement that the search also violate some right of privacy. In Jacobsen, no privacy concerns were implicated since the package had already been opened before the police seizure but the court nevertheless analyzed the seizure as a possible Fourth Amendment violation. In Texas v. Brown, 460 U.S. 730, 747 (1982) Justice Stevens, in a concurring opinion, noted that

> The (Fourth) Amendment protects two different interests of the citizen - the interest in retaining possession of property and the interest in maintaining personal privacy. A seizure threatens the former, a search the latter.

This was reiterated in Horton v. California, where the court defined a seizure as "depriv(ing) the individual of dominion over his or her person or property." __ U.S. __, 110 S. Ct. 2301 at 2306 (1990). See also Maryland v. Macon, 472 U.S. 463, 469 (1984)

The majority's cite to Hudson v. Palmer, 468 U.S. 516 (1984) does not help its argument. Hudson v. Palmer expressly accepted that seizure of property alone could be a Fourth Amendment violation, stating "Assuming that the Fourth Amendment protects against the destruction of property, in addition to its mere

seizure..." 468 U.S. at 528 n. 8, (emphasis added). There the court's rejection of the plaintiff's Fourth Amendment claims was based on its holding that prison inmates have neither privacy nor possessory rights under the Fourth Amendment in property in their jail cells. 468 U.S. at 527-28 n.8, 538, 542, 544-45 Here, on the other hand, it was unquestioned that the plaintiffs had plenary possessory rights to their home. The Soldals were free citizens, poor perhaps and lacking the political clout to secure assistance from the Cook County Sheriff's Department, but as entitled as anyone to enjoy the property that was legally theirs, and as entitled as anyone to have the courts protect those rights. The Seventh Circuit majority opinion denied that protection.

The majority opinion also asserts that this is really a procedural due process case and argues that under Graham v. Connor, 490 U.S. 386 (1989), the plaintiffs must bring their §1983 lawsuit as a procedural due process claim, even though that claim would undoubtedly fail. 942 F.2d at 1075 This is a wide reading of Graham unsupported by the language of the decision. Graham held that §1983 arrest claims should be judged under the Fourth Amendment, rather than the Fourteenth, and noted that specific provisions of the bill of rights, rather than substantive due process, should, where possible, support §1983 actions. 490 U.S. at 395 But this case is completely different. In Graham the issue was which of two different constitutional amendments should govern. Here, the majority acknowledges that the Soldals did not have a

procedural due process claim.[11]

Moreover, plaintiff's claim was not a procedural due process claim. The plaintiffs' injuries were not caused by the failure to provide the proper hearings but by the seizure of their home, a seizure that the defendants could not legally have accomplished even if they had used the correct procedures.[12] There has been no showing that a suit for dispossession would have succeeded, and it most assuredly could not have succeeded on September 4, since the eviction proceeding was not set for trial until September 22. Under the majority's analysis many Fourth Amendment violations could easily be re-cast as procedural due process cases. Thus, a warrantless arrest in, or search of, a home, with probable cause, has long been considered unreasonable and a Fourth Amendment violation. Yet the arrest or search is deficient because the correct procedure was not followed.

Underlying the majority's reasoning runs a sense that the Soldals were entitled to less protection because they were tenants and because their home was a trailer rather than a fixed structure. Yet even an overnight guest has a legitimate expectation of privacy that the Fourth Amendment will protect, Minnesota v. Olson, 495 U.S. ___, 495 U.S. ___, 110 S.Ct. 1684 (1990), and the type of construction of a home has never been relevant to Fourth Amendment

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[11]As the majority notes, the plaintiffs did not try to plead or prove a procedural due process claim. 942 F.2d 1075

[12]The original panel opinion asserted that the plaintiffs were behind in their rent. This assertion is inaccurate and has no valid basis in the record.

concerns.[13] The present case is conceptually no different than if a municipal housing officer took it upon himself to demolish a brick home lived in by a homeowner, asserting that it was in violation of building codes. If in fact it were, demolition would be possible, yet surely any court would treat the demolition as a violation of the homeowner's right to be secure in her home.

Also underlying the majority's reasoning is the judgment that property interests are entitled to little constitutional protection. This value judgment has never been accepted by this Court. The holding of a District Court case cited by the majority, McCormick v. First National Bank of Miami, 322 F.Supp. 604 (S.D. Fla. 1971), that 28 U.S.C. §1343(3) does not confer jurisdiction for deprivation of property rights, was decisively rejected that same year in Lynch v. Household Finance Corp., 405 U.S. 538 (1971). The court held:

> ...the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the property in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

405 U.S. at 552. This ringing endorsement of property rights is a

[13]"The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement." William Pitt the Elder

far cry from the majority's parsimonious relegation of property rights to an unprovable cause of action.

Here, the police and private defendants worked together to violate the plaintiffs' rights, depriving them of the security of their house by an unreasonable seizure. The majority's suggestion that recognizing a Fourth Amendment cause of action will "trivialize the amendment and gratuitously shift a large body of routine commercial litigation from the state courts to the federal courts" 942 F.2d at 1077, reflects an astounding lack of appreciation of the harm the Soldals suffered and the magnitude of the defendants' misconduct. This was hardly "routine commercial litigation," and protection of a person's home has never before been considered trivial. Commercial litigation rarely features the forceful intervention of police officers, and when it does the intervention should be judged against constitutional standards. If the intervention was pursuant to an apparently valid law, warrant, or other judicial determination, then the intervention should be found reasonable and the Fourth Amendment claim dismissed. If there is no such authority for the seizure, and if the seizure was otherwise without justification, then the seizure was in fact unreasonable and should be held so under the Fourth Amendment. But the specter of a horde of Fourth Amendment commercial claims, clamoring at the castle gates for Soldal to be overturned so they can overrun the fortress, is a hoax.

The opinion is in conflict with a plethora of decisions of this Court, and with other courts of appeals. See, e.g., Autoworld

Specialty Cars Inc. v. U.S., 815 F.2d 385 (6th Cir. 1987) (seizure of cars displayed for sale analyzed under Fourth Amendment standard); U.S. v. Bagley, 772 F.2d 482 (9th Cir. 1985) ("towing the automobile to the police lot constituted a seizure within the meaning of the Fourth Amendment") Spect v. Jensen, 832 F.2d 1516 (10th Cir. 1987) (upholding Fourth Amendment liability against persons engaged in repossession of personal property); United States v. Allen, 644 F.2d 749 (9th Cir. 1980) (officer's announcement he intended to seize suitcase constituted Fourth Amendment seizure); United States v. Cagle, 849 F.2d 924 (5th Cir. 1988) (temporary detention of suitcase at airport causing it to miss flight was an unreasonable seizure under the Fourth Amendment).

As an en banc opinion the Seventh Circuit holding assumes special importance. Because the majority opinion sets the Fourth Amendment heading in a direction opposite to the decisions of this court and other courts of appeal certiorari should be granted and the case set down for plenary argument.

II. The damaging of plaintiffs' home violated their Fourteenth Amendment right to substantive due process.

The plaintiffs' complaint alleged (R. 1, para. 15, 31, 33), and their evidence tended to prove (R.56, Att. E, p. 22, 27, 52), that the deputy sheriffs partially destroyed their home. The plaintiffs asserted that this violated their rights under the Fourteenth Amendment to substantive due process. (R.1, para. 33) The panel opinion, however, failed to address this aspect of their claim, in effect denying it.

As Judge Flaum pointed out in his panel dissent, 923 F.2d 1251, the wanton destruction of the trailer amounted to an actionable deprivation under the substantive due process clause of the Fourteenth Amendment. The destruction of the plaintiffs' property would be wrongful whether or not the proper procedures for an eviction were used. Zinermon v. Burch, ___ U.S. ___, 110 S.Ct. 975, 983 (1990). Thus, the claim was not for a violation of procedural, but rather substantive, due process.

Because the panel opinion unduly restricts the scope of the Fourteenth Amendment substantive due process protections the Court should grant certiorari on this issue.

CONCLUSION

For all of the above reasons, petitioner respectfully urges this Honorable Court to grant his Petition for a Writ of Certiorari as to both issues raised herein.

Respectfully submitted,

Dated: November 21, 1991

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APPENDIX

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A: En Banc decision of the United States Court of Appeals for the Seventh Circuit. 942 F.2d 1073

B: Panel Decision of the United States Court of Appeals for the Seventh Circuit. 923 F.2d 1241

C: Decision of the United States District Court

APPENDIX A

ES

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cannot support a finding
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127 Mich.App. 482, 487,
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nkins, 141 Mich.App. at
at 229.

III.

-stated reasons, we RE-
ict court's November 25,

1988, order granting summary judgment in favor of defendant and REMAND this case for a full hearing on the disputed issues of material fact as to whether defendant's proffered reason for the disparate treatment accorded plaintiff were in fact pretexts for racial discrimination.

Edward SOLDAL, et al., Plaintiffs–Appellants,

v.

COUNTY OF COOK, et al., Defendants–Appellees.

No. 89–3631.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 14, 1990.

Decided Jan. 24, 1991.

Reheard En Banc June 11, 1991.

Decided Aug. 27, 1991.

Owners of mobile home brought suit under § 1983 against sheriff's deputies and employees of trailer park, alleging that disconnection of their trailer from utilities by employees and their towing of trailer off park premises, while being observed by sheriff's deputies, was a violation of their Fourth Amendment right against unlawful search and seizure. The United States District Court for the Northern District of Illinois, Charles P. Kocoras, J., granted summary judgment in favor of deputies and employees and appeal was taken. A panel of the Court of Appeals, 923 F.2d 1241, affirmed in part, reversed in part, and remanded. Thereafter the Court of Appeals, 931 F.2d 445, granted petition for rehearing en banc and vacated earlier opinion. On rehearing the Court of Appeals, Posner, Circuit Judge, held that movement of trailer home from camp, without any effort to search it, did not constituted a "seizure" prohibited by the Fourth Amendment, and there was consequently no violation of constitutional right to support § 1983 action.

Affirmed in part, reversed in part and remanded.

Easterbrook, Circuit Judge, concurred and filed opinion.

Flaum, Circuit Judge, dissented and filed opinion, in which Bauer, Chief Judge, and Harlington Wood, Jr., Ripple and Kanne, Circuit Judges, joined.

1. Civil Rights ⇐198(8)

Action of private person in enforcing rights conferred on him by state law is not deemed state action, for purposes of bringing § 1983 suit. 42 U.S.C.A. § 1983.

2. Civil Rights ⇐198(8)

Given state of record, action of employees of private trailer park, in disconnecting mobile home from utilities in sewer and towing it off premises, while sheriff deputies stood by to preclude owners from violently opposing eviction, was state action for purposes of bringing § 1983 claim; conspiracy between employees and police would be implied. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

3. Searches and Seizures ⇐13

Disconnection of mobile home from utilities, and towing of home off trailer park premises, did not constitute a "seizure" for purposes of owners' claim that their Fourth Amendment right against searches and seizures had been violated; purpose of activities was to simply evict tenant, and there had been no previous search for evidence of crime, in violation of owners' privacy rights. U.S.C.A. Const. Amend. 4; 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

4. Civil Rights ⇐131

Assuming that some "element" or "tincture" of Fourth Amendment seizure was present in the disconnecting of utilities from a mobile trailer home and towing it

off premises, accomplished by trailer park personnel under the observation of sheriff's deputies there to prevent violent opposition by owners, owners did not have a § 1983 claim; "gist" of owner's claim was simple wrongful eviction. U.S.C.A. Const. Amend. 4; 42 U.S.C.A. § 1983.

John L. Stainthorp (argued), Peoples Law Office, Chicago, Ill., for plaintiffs-appellants Edward Soldal and Mary Soldal, individually and as legal guardians.

Madeleine S. Murphy, Asst. State Atty., Randolph M. Johnston (argued), Office of State's Atty. of Cook County, Chicago, Ill., for defendants-appellees County of Cook, Lt. Jones, Officer Haritos, Officer Hunt, Officer Vaid, Captain Jackson, Captain Levy and Chief Wittsman.

Randolph M. Johnston, Office of State's Atty. of Cook County, Chicago, Ill., for defendants-appellees Officer Doe and Officer Poe.

Randolph M. Johnston, Office of State's Atty. of Cook County, Chicago, Ill., John C. Vojta, Vojta & Lagattuta, Schaumburg, Ill., for defendants-appellees Jeffrey Peterson, Kimberly Giovanni, and Margaret Celeski.

Randolph M. Johnston, Office of State's Atty. of Cook County, John J. George, Dennis J. Aukstik (argued), Robert T. Oleszkiewicz, Daley & George, Chicago, Ill., for defendants-appellees Margaret Hale and Terrace Properties.

Before BAUER, Chief Judge, and CUMMINGS, WOOD, Jr., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION and KANNE, Circuit Judges.

POSNER, Circuit Judge.

We granted rehearing en banc to consider the applicability of the Fourth Amendment, which forbids unreasonable searches and seizures, to the removal of a mobile home from a trailer park. The three-judge panel that first heard the appeal held by a divided vote that the removal was not within the scope of the Fourth Amendment. 923 F.2d 1241, 1249–50 (7th Cir.1991). The full court adheres to this conclusion but has decided to elaborate its grounds. This opinion supersedes the panel's discussion of the Fourth Amendment, but in all other respects the panel opinion is reinstated.

Edward Soldal lived with his wife and four children in a trailer home, which he owned, situated on a rented lot in a trailer park in Elk Grove, Illinois. The owner of the trailer park, Terrace Properties, decided to evict the Soldals, and sued in an Illinois state court for an eviction order. Two weeks *before* the court hearing, Terrace Properties decided to go ahead and evict the Soldals forcibly. Anticipating the possibility of resistance, Margaret Hale, the manager of the trailer park, notified the Cook County sheriff's office; and when two employees of Terrace Properties showed up at the Soldals' trailer home to remove it, they were accompanied by a Cook County deputy sheriff, who told Soldal that he was there to prevent him from interfering with the eviction. Other deputy sheriffs were also at the scene to ensure that the eviction proceeded without interruption. In removing the sewer and water boxes from the side of the trailer home, the employees damaged the home. When they finished disconnecting the home from the utilities, they towed it off the lot and out of the trailer park. The eviction violated Illinois law, because no court order authorizing it had yet been issued—none ever *was* issued.

[1] The Soldals' suit is against Terrace Properties and Mrs. Hale as well as against the deputy sheriffs, and is brought under 42 U.S.C. § 1983, which provides a civil remedy for the deprivation of federal rights by persons acting under color of state law. An initial problem in such a case, from a plaintiff's standpoint, is how to bring *private* defendants under the rubric of persons acting under color of *state* law, a category normally reserved for state and municipal employees. Had the private defendants in this case, Terrace Properties and Mrs. Hale, been acting pursuant to a court order when they had the trailer home removed, this might have made their action

state action. *Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc.*, 795 F.2d 1344, 1346 (7th Cir.1986); cf. *Edmonson v. Leesville Concrete Co.*, — U.S. —, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). But they were not; and the action of a private person in enforcing rights conferred on him by state law is not deemed state action. *Id.* 111 S.Ct. at 2083; *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 485, 108 S.Ct. 1340, 1345, 99 L.Ed.2d 565 (1988); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 164–65, 98 S.Ct. 1729, 1737–38, 56 L.Ed.2d 185 (1978). Otherwise everything would be state action, since what law does not forbid it permits.

[2] As for the public defendants in this case—the deputy sheriffs (county police)—the mere presence of police at the scene of a private act (here, the eviction of the Soldals by Terrace's employees) *in which they do not participate* does not transform the private act into a public one. *Gramenos v. Jewel Cos.*, 797 F.2d 432, 435 (7th Cir.1986). But there was more here. The eviction was unlawful, and Soldal had a common law right to resist it forcibly, although his right was limited to using mild force. The deputy sheriffs prevented Soldal from exercising his right, and while this by itself may not have made them actual participants in the eviction, the condition of the record (the case was dismissed on summary judgment) requires us, as the panel opinion explained, to assume that there was a conspiracy between the private and the public defendants—that the deputy sheriffs joined Terrace Properties in a scheme to get rid of a pesky tenant, a troublemaker. 923 F.2d at 1247–48. If so, it is as if the deputy sheriffs themselves seized the trailer, disconnected it from the utilities, and towed it away. Equivalently it is as if they had deputized the private defendants to assist them. Thus, on the state of the record, we must regard *all* of the defendants as having acted under color of state law.

This frames the question that we granted rehearing en banc to decide: If police officers disconnect and tow away a trailer home, can their action be challenged under the Fourth Amendment as an unreasonable seizure? The question is of surprising novelty, and its implications for other forms of eviction and even perhaps for the repossession of automobiles and other personal property make it of potentially far-reaching practical significance. The history of the question in the courts can be recounted briefly. The question was left open in *Fuentes v. Shevin*, 407 U.S. 67, 96 n. 32, 92 S.Ct. 1983, 2002 n. 32, 32 L.Ed.2d 556 (1972). A glancing reference in *Tavarez v. O'Malley*, 826 F.2d 671, 678 (7th Cir.1987), expressed the skepticism of three members of this court. The Third Circuit gave a peremptory "no" in *Lebowitz v. Forbes Leasing & Finance Corp.*, 456 F.2d 979, 980 (3d Cir.1972). There is, as we shall see, a Tenth Circuit case that bears closely though not decisively on the issue. The district courts are divided on it. Compare *Dorsey v. Community Stores Corp.*, 346 F.Supp. 103 (E.D.Wis.1972) (3-judge panel), and *Laprease v. Raymours Furniture Co.*, 315 F.Supp. 716, 721–22 (N.D.N.Y.1970) (same), with *McCormick v. First National Bank*, 322 F.Supp. 604 (S.D.Fla.1971).

It is no accident that the question has not arisen more often. The straightforward way for a plaintiff to mount a challenge under section 1983 to an eviction or repossession or other deprivation of property is by claiming that he was deprived of his property without due process of law, as in the *Del's* case cited earlier and a host of other cases. The panel held that the Soldals had abandoned any such claim. 923 F.2d at 1248. They were prudent to do so. In the circumstances of this case they would have faced a distinctly uphill fight to establish it. The Supreme Court has held that the denial of procedural rights (here the rights that Illinois law grants tenants in eviction proceedings) as a result of the random and unauthorized acts of subordinate public officers (the deputy sheriffs in this case) is not actionable under section 1983 unless the plaintiff lacks adequate judicial remedies under state law. *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990); see also *Easter House v. Felder*, 910 F.2d 1387, 1396–97 (7th Cir.1990) (en

banc). Illinois law entitled the Soldals to sue Terrace Properties and Mrs. Hale for the damages caused by the illegal eviction. Ill.Rev.Stat. ch. 80, ¶ 221. The Soldals had an adequate remedy. They failed to use it.

The existence of adequate legal remedies for an illegal eviction such as occurred here—state remedies if they are adequate, a federal remedy under the due process clause if not—is pertinent to deciding whether the Fourth Amendment should be bent to provide the Soldals with still another remedy. Bent it would have to be, because the amendment was never intended to regulate garden-variety commercial disputes of the sort involved in this case. Why bend, when the Soldals had adequate alternatives?

[3] The Fourth Amendment regulates both "searches" and "seizures" and it will be helpful to distinguish between the two. Even though we are treating the employees of Terrace who did the actual disconnection and removal as if they had been police officers employed by the State of Illinois, we can hardly construe their conduct as a police *search*. The "officers" did not enter the Soldals' trailer home. They had no interest in what was in it. They were not conducting an investigation or seeking to make an arrest. There was, however, at least in a literal sense, a "seizure" of the home and its contents; and while most seizures that are challenged under the Fourth Amendment are incidental to a search, some are not. The most common seizure challenged under the amendment is an arrest, and it is actionable whether or not it is accompanied by a search.

With only a few exceptions, the seizures held to be forbidden by the Fourth Amendment have been seizures made in the course of public law enforcement—certainly arrests are of that character—rather than repossessions or other seizures made in the course of a dispute between two private parties, even if police officers were assisting the person doing the seizing to the extent of being coconspirators with him. A good example is *Autoworld Specialty Cars, Inc. v. United States*, 815 F.2d 385, 389 (6th Cir.1987), where law-enforcement officers removed vehicles from a dealer's showroom for use in evidence in a criminal prosecution against the dealer. It could indeed be argued on textual and historical grounds that despite its broad wording the Fourth Amendment has no proper application outside the law enforcement context. Not only the second clause of the Fourth Amendment—the clause that places limitations on warrants—but also the background against which the amendment was enacted indicates that the searches and seizures to which the amendment refers are those made for purposes of law enforcement, not those made in connection with private disputes over property rights. Cf. *Wyman v. Jones*, 400 U.S. 309, 317, 91 S.Ct. 381, 385, 27 L.Ed.2d 408 (1971).

But a constitutional provision need not be interpreted so narrowly as to disable it from reaching novel abuses of power. The Fourth Amendment, at least, has not been so interpreted. It has been held to regulate wiretapping and administrative searches, *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), neither a practice with which the framers of the amendment were acquainted. Repossessions and evictions may be far from the core of the Fourth Amendment but we hesitate to suggest that they can never provide the setting for a violation of the amendment. In *Specht v. Jensen*, 832 F.2d 1516 (10th Cir.1987), remanded on unrelated grounds, 853 F.2d 805 (10th Cir. 1988) (en banc), a search of the plaintiff's home by a creditor accompanied by the police was held to violate the Fourth Amendment. We agree with that decision; and it is the closest case to ours. But there is a crucial difference. In *Specht* the conduct of the police invaded an interest that the Fourth Amendment unquestionably protects: the interest in the privacy of the home. (The court in *Specht* emphasized this point. 832 F.2d at 1520.) The invasion was no less extensive, intrusive, or injurious just because the police were assisting a creditor rather than enforcing criminal or other public law.

It might seem, though, that the removal of the trailer home in this case was a "seizure" on the same footing with the "search" of the home in *Specht*. Literally there was a "seizure" here, but to use a literal interpretation of a constitutional provision enacted two centuries ago to make every repossession and eviction with police assistance actionable under—of all things—the Fourth Amendment would both trivialize the amendment and gratuitously shift a large body of routine commercial litigation from the state courts to the federal courts. That trivializing, this shift, can be prevented by recognizing the difference between possessory and privacy interests.

The police did not enter Soldal's trailer home. They did not rummage among his possessions. They did not arrest him (that came later, and is dealt with in an unrelated part of the panel opinion). They did not invade the private "space," for solitude or secrecy, that the Fourth Amendment protects. *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). In that respect this case is like *Cardwell v. Lewis*, 417 U.S. 583, 591, 94 S.Ct. 2464, 2470, 41 L.Ed.2d 325 (1974) (plurality opinion), where "nothing from the interior of the car and no personal effects, which the Fourth Amendment traditionally has been deemed to protect, were searched or seized and introduced in evidence. With the 'search' limited to the examination of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle left in the public parking lot, we fail to comprehend what expectation of privacy was infringed." (Footnotes omitted.) The police did, of course, take Soldal's home away, and that was a grave deprivation. But it was a deprivation purely of property; there was no invasion of the Soldals' privacy.

Of course this conclusion depends on how broadly or narrowly we define "privacy." Any interference with solitude is an infringement of privacy in a perfectly good sense of the word; thus an unwanted telephone solicitation is an invasion of privacy. And the Supreme Court has often used "privacy" as a synonym for reproductive autonomy. But it would be odd to suggest that a telephone solicitation aimed at selling tickets to the policemen's ball, or a law regulating abortions, invades privacy in a sense *relevant to the Fourth Amendment*. That sense has to do, rather, with the interest in keeping at bay prying ears and prying eyes. It is not invaded by an eviction or repossession; it can be invaded by a search or other entry into the home incident to an eviction or repossession.

In modern law the interests in property and in (Fourth Amendment) privacy are protected by different constitutional provisions and by different bodies of constitutional doctrine. *Hudson v. Palmer*, 468 U.S. 517, 538–40, 104 S.Ct. 3194, 3206–07, 82 L.Ed.2d 393 (1984) (concurring opinion). It is true that the older cases, illustrated by *Olmstead*, often tied the protections of the Fourth Amendment to property concepts, such as trespass. The modern cases, however, well illustrated by *Katz*, which overruled *Olmstead*, refocus the amendment from property to privacy in accordance with Justice Brandeis's dissent in *Olmstead*. This leaves deprivations of property to be regulated by the due process clause (also the takings clause, but that is not involved in this appeal, for reasons explained in the panel opinion, 923 F.2d at 1248–49). We have already noted that in interpreting that clause the Supreme Court has held (with qualifications not relevant to our case) that a person who claims to have been deprived of his property by the state without due process of law must use the judicial remedies that the state has provided for such deprivations. That requirement would be nullified if the property owner could avoid it by recasting his suit as one under the Fourth Amendment rather than under the Fifth (or Fourteenth) Amendment. The elaborate jurisprudence of property deprivations under the due process clause that culminates in *Zinermon v. Burch* would turn out to be a point about pleading.

Hudson v. Palmer illustrates the distinction we are making between property and privacy. Prison guards searched the plain-

tiff's cell and seized items of his personal property. This was as much a seizure of property as the removal of the Soldals' trailer. Yet the Supreme Court held that the Fourth Amendment did not apply. It did not apply because, the majority opinion concludes (Justice O'Connor's concurrence is less definite on this point and she was the fifth vote, but she joined Chief Justice Burger's opinion, thus making it a majority opinion), prison inmates have no right of privacy. 468 U.S. at 526–28 and n. 8, 104 S.Ct. at 3200–01 and n. 8. Prison extinguishes that. It does not extinguish property rights, but the Fourth Amendment does not provide a remedy for a pure deprivation of property rights. The remedy in a proper Fourth Amendment case includes the value of any property rights impaired or destroyed—such impairment or destruction is an item of consequential damages in a suit for the violation of the constitutional right. *Taliferro v. Augle*, 757 F.2d 157, 161–62 (7th Cir.1985); *Specht v. Jensen*, *supra*, 832 F.2d at 1528; *B.C.R. Transport Co. v. Fontaine*, 727 F.2d 7, 12 (1st Cir. 1984); *Marrero v. City of Hialeah*, 625 F.2d 499, 514 (5th Cir.1980). But if the only rights impaired or destroyed are property rights, the case is not actionable under the Fourth Amendment in the first place.

The cases, it is true, distinguish between a "possessory" interest said to be protected against unreasonable "seizure" and a "privacy" interest protected against unreasonable "search." *United States v. Jacobsen*, 466 U.S. 109, 113 and n. 5, 104 S.Ct. 1652, 1656 and n. 5, 80 L.Ed.2d 85 (1984); *Segura v. United States*, 468 U.S. 796, 806, 104 S.Ct. 3380, 3386, 82 L.Ed.2d 599 (1984); *Maryland v. Macon*, 472 U.S. 463, 469, 105 S.Ct. 2778, 2782, 86 L.Ed.2d 370 (1985); *Arizona v. Hicks*, 480 U.S. 321, 324, 107 S.Ct. 1149, 1152, 94 L.Ed.2d 347 (1987); *Horton v. California*, — U.S. —, 110 S.Ct. 2301, 2306, 110 L.Ed.2d 112 (1990); see 1 Wayne R. LaFave, *Search and Seizures* § 2.1(a), at pp. 299–300 (2d ed. 1987). Justice Stevens, dissenting in *Hudson v. Palmer*, thought that such decisions required a different result in that case. 468 U.S. at 543–44, 104 S.Ct. at 3209. Obviously the majority disagreed. The path of reconciliation lies in recognizing that the privacy which the Fourth Amendment protects is the privacy not only of oneself and one's home, as we have thus far been assuming, but also, as the amendment states, of one's "effects." "Effects" are personal property, and are frequently affected with a privacy interest. Just as it is an impairment of privacy to seize one's person (that is, to arrest one), so it can be an impairment of privacy to seize one's personal property. Opening a letter is an obvious example, and it is no accident that the list of protections in the Fourth Amendment includes "papers" as well as persons, houses, and effects. The opening of a package, as in *Jacobsen*, is another example of how a seizure can invade privacy. But not every interference with exclusive dominion and control over one's property is a seizure in the relevant sense because not every such interference compromises privacy. Merely removing luggage from an airport conveyor belt and squeezing it has been held not to be a seizure. *United States v. Lovell*, 849 F.2d 910, 915–16 (5th Cir.1988); *United States v. Garcia*, 849 F.2d 917, 919 (5th Cir.1988); *United States v. Brown*, 884 F.2d 1309, 1311 (9th Cir.1989). See also *Arizona v. Hicks*, *supra*, 480 U.S. at 324, 107 S.Ct. at 1152; *United States v. Karo*, 468 U.S. 705, 712–13, 104 S.Ct. 3296, 3302, 82 L.Ed.2d 530 (1984). It is different if the police "secure" a residence, that is, take it over, without searching it, while awaiting the arrival of a search warrant. That is a palpable interference with privacy—the police are in the home, looking about—even though it is not a search; it is rightly classified as a Fourth Amendment seizure. *United States v. Lindsey*, 877 F.2d 777, 780 (9th Cir.1989). The physical movement of the Soldals' home—the privacy of its interior uncompromised and unobserved—was not a seizure.

The distinction may seem a fine one. The Fourth Amendment abounds in fine distinctions, perhaps more than are necessary. *California v. Acevedo*, — U.S. —, 111 S.Ct. 1982, 1991, 114 L.Ed.2d 619 (1991). But the particular distinction that we have just elaborated (and that future

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cases will no doubt elaborate further) between a Fourth Amendment seizure and other types of interference with property is necessary not only if we are to make sense of *Hudson v. Palmer* but also if the Fourth Amendment is not to swallow the due process clause. If police tow an illegally parked car, without entering or even looking into it, it is a deprivation of property within the meaning of the due process clause, *Sutton v. City of Milwaukee*, 672 F.2d 644 (7th Cir.1982); *Saukstelis v. City of Chicago*, 932 F.2d 1171, 1172 (7th Cir.1991), but is it also a seizure under the Fourth Amendment?

The distinction we are drawing between property and privacy interests in one sense helps explain, and in another sense is thrown into question by, the "plain view" doctrine, that is, the doctrine that if police are lawfully on the premises they can seize contraband or evidence that is in their plain view even if they had gained admittance to the premises without a warrant and without probable cause to believe they would find anything; their presence might, for example, be lawful only because the owner had consented. *Horton v. California*, *supra*; *United States v. Cardona-Rivera*, 904 F.2d 1149, 1154–55 (7th Cir.1990); *United States v. Perry*, 815 F.2d 1100, 1105 (7th Cir.1987). There is no incremental invasion of privacy if something is seized that is in, as it were, lawful public view; the thing is no longer private; and the owner's property right is not a Fourth Amendment shield. This point is further illustrated by *GM Leasing Corp. v. United States*, 429 U.S. 338, 351–52, 97 S.Ct. 619, 628, 50 L.Ed.2d 530 (1977), which upheld the Internal Revenue Service's seizure without a warrant of the plaintiff's automobiles because it "took place on public streets, parking lots, or other open places, and did not involve any violation of privacy," but not the seizure of books and records since that "involved intrusion in the privacy of the [plaintiff's] offices." Of similar character are the "open field" cases, such as *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), and *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). And see *Autoworld Specialty Cars, Inc. v. United States*, *supra*, 815 F.2d at 388.

Yet in all these cases the seizure of items that were in the public view, while lawful, was treated as a *Fourth Amendment* seizure, so that it had to be pronounced reasonable (for example because it was consented to, or supported by probable cause, or it seized something that was in plain view) before it could be permitted. The reason, however, is that seizures made in the course of investigations by police or other law enforcement officers are almost always, as in the plain view cases, the culmination of searches. The police search in order to seize, and it is the search *and ensuing seizure* that the Fourth Amendment by its reference to "searches and seizures" seeks to regulate. Seizure means one thing when it is the outcome of a search; it may mean something else when it stands apart from a search or any other investigative activity. The Fourth Amendment may still nominally apply, but, precisely because there is no invasion of privacy, the usual rules do not apply.

There is another reason for distinguishing public law enforcement from other contexts in which seizures may occur, and that is the historical connection between the Fourth Amendment and liberty. The objection to an arrest is not only that it is an invasion of privacy, but also that it is a restriction of liberty. *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 88 S.Ct. 1868, 1879 n. 16, 20 L.Ed.2d 889 (1968). Some property seizures are of this character as well, such as prolonged detention of an individual's luggage at an airport, which by preventing him from continuing on his way curtails his liberty. *United States v. Place*, 462 U.S. 696, 708–09, 103 S.Ct. 2637, 2645, 77 L.Ed.2d 110 (1983). In none of these cases is the court concerned with property rights as such, although in some of the cases property rights get mentioned in connection with the questionof standing to maintain a Fourth Amendment challenge, an issue since laid to rest by *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980). Outside of the law enforcement area the Fourth Amendment

retains its force as a protection against searches, because they invade privacy. That is why we decline to confine the amendment to the law enforcement setting. But concerns of liberty will rarely be present outside of that setting and they are not in this case—which because it is a case of seizure, not search, does not involve an invasion of privacy either.

[4] Thus, *no* interest protected by the Fourth Amendment is involved, and this helps show that even if, despite what we have said, there is some element or tincture of a Fourth Amendment seizure, it cannot carry the day for the Soldals. *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), establishes the principle that the dominant character of the conduct challenged in a section 1983 case determines the constitutional standard under which it is evaluated. The narrow holding of *Graham* is that when the gist of the challenged conduct is an arrest, the court should use the standards of the Fourth Amendment to adjudge its lawfulness even though the conduct could also be characterized as a deprivation of liberty. But the converse should also be true. If the gist of the challenged conduct is a repossession or eviction conventionally challenged under the due process clause as a deprivation, recharacterization as a Fourth Amendment seizure is barred. The suggestion that *Graham* stands for the proposition that all property disputes should so far as possible be stuffed into the Fourth Amendment strikes us as bizarre.

Mr. Soldal is neither an arrestee (so far as pertinent to this part of the case) nor a prison inmate, but the principles of *Graham v. Connor* and *Hudson v. Palmer* sweep broader than their facts or narrow holdings, and the need to carve the joint between the Fourth Amendment and the due process clause is as urgent in this case as in an arrest case or a prisoner case. The decisions require us to mesh the different provisions in or incorporated by the Fourteenth Amendment while preserving their separate domains—and thus to make the amendment coherent. *Hudson* tells us to do so by allocating the protection of privacy to the Fourth Amendment and the protection of property to the due process clauses of the Fifth and Fourteenth Amendments. *United States v. Janik*, 723 F.2d 537, 547–48 (7th Cir.1983); cf. *United States v. Karo*, *supra*, 468 U.S. at 713, 104 S.Ct. at 3302. Mr. Soldal lost his property, but not his privacy or his liberty. He has no Fourth Amendment case. He had other legal remedies but he waived them.

The paradox seemingly presented by our decision—that the law-abiding have fewer rights under the Fourth Amendment than the criminal—is superficial. Different constitutional provisions protect different interests. The Fourth Amendment protects privacy, and that interest is more likely to be infringed by criminal investigations than by other governmental activities—though the law-abiding are, occasionally, the inadvertent and, rarely, the intended targets of a criminal investigation, and when that happens they receive the full protection of the amendment. The due process clause of the Fifth and Fourteenth Amendments is among the provisions that protect property (though that is not all it protects); and property interests are more likely to be asserted by the law-abiding than by the criminal class. The Soldals, to repeat, had remedies; they chose the wrong one.

For the reasons stated in this and the panel opinion, the judgment of the district court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

EASTERBROOK, Circuit Judge, concurring.

One might think from reading the dissenting opinion that we have rejected *Entick v. Carrington*, [1765] 19 Howell's State Trials 1029. Yet everyone agrees that both privacy and possessory interests in a home are substantial and that the Soldals are entitled to damages if their allegations prove true. All the court's opinion, which I join, holds is that this dispute about premature eviction should be handled like other landlord-tenant disputes—in local housing court.

Dragooning such a case into federal court under the aegis of 42 U.S.C. § 1983 is lexically possible, for the fourth amendment is written broadly. When interpreting the Constitution it is tempting to see how far old texts can be pressed—for any limitations, any at all, create at least some possibility of horrible deeds slipping into the cracks. A sophisticated lawyer worried about abuses starts with the text and identifies its purposes and consequences. The fourth amendment protects both privacy and property—and of course property comprises many rights, including possession. Next comes a generalization in which the Constitution deals with whatever may threaten these interests to any degree. That move eliminates loopholes, but at the expense of making the fourth amendment so universal that it occupies the field of governmental action. Privacy and property interests just about exhaust the entitlements our legal system recognizes. As the fourth amendment bars unreasonable action, a reading taking the covered interests to the limits transfers to the federal judiciary the power to decide whether every public action is reasonable. What is left for the rest of the Constitution—or for state law and democratic choice?

If the fourth amendment indeed covers all governmental action interfering with possessory interests, the implications are startling. Public employees repairing a street negligently rupture a gas main, requiring the evacuation of a city block. That action invades a possessory interest, for it deprives the householders of the practical ability to use their homes. Negligence is never reasonable, and the fourth amendment establishes objective standards, under which the public employees' states of mind do not matter. *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989); *Maryland v. Macon*, 472 U.S. 463, 470–71, 105 S.Ct. 2778, 2782–83, 86 L.Ed.2d 370 (1985); *Scott v. United States*, 436 U.S. 128, 136–38, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168 (1978). Public utility companies will be surprised to learn that turning off the water or electricity poses not only a problem under the due process clause, which they may solve by offering their customers an opportunity to comment, *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978), but also a problem under the fourth amendment, requiring *substantive* federal review of the "reasonableness" of the decision—for disconnecting utilities is the step said to prevent the Soldals from using their trailer and so violate the fourth amendment.

All the sheriffs' deputies did was stand by while the landlord's employees disconnected the trailer's utilities and removed it from their lot. If this is a "seizure" of any kind by the deputies, cf. *California v. Hodari D.*, — U.S. —, 111 S.Ct. 1547, 1550–51, 113 L.Ed.2d 690 (1991), it is problematic only because state law specifies that a court order precede eviction. Indeed, the only reason why the removal of the mobile home is said to be "unreasonable" is that it violated state law, and this whether or not the Soldals really were behind in their rent or disregarded some clause of the lease. Our case is another chapter in the saga of attempts to transmute state rules into constitutional ones. If the Soldals were right in thinking that there was a "seizure", the question would remain whether a federal norm, independent of state law, nonetheless deems their acts unreasonable. *Elkins v. United States*, 364 U.S. 206, 223–24, 80 S.Ct. 1437, 1447, 4 L.Ed.2d 1669 (1960) ("In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry.... The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed."). States could decide to allow landlords to engage in self-help and put the burden of initiating litigation on the tenant. If deputies may keep the peace during self-help in a state where tenants must start the legal proceedings, they may prevent violence during self-help in a state where landlords have (but disdain) the burden of initiation. Only state law distinguishes these cases, and the Constitution is unaffected by state law. It is hard to conceive

of the Soldals' invocation of the litigation-first rule established by Illinois law as a claim under the fourth amendment, so the suit was properly dismissed even if a seizure occurred. States may decide for themselves how extensive will be the remedies for gun-jumping.

FLAUM, Circuit Judge, with whom BAUER, Chief Judge, and HARLINGTON WOOD, Jr., RIPPLE and KANNE, Circuit Judges, join, dissenting.[1]

In its effort to develop a rationale for denying the Soldals' fourth amendment claim, the majority has produced a remarkable holding. The fourth amendment, it maintains, governs should police *intrude* upon your privacy by searching your home. Should they instead intentionally *eliminate* your privacy by participating in the carting away of your residence, the fourth amendment can have no bearing. With all due respect, I dissent.

The majority acknowledges that the police denied the Soldals the privacy of their home, but maintains that the fourth amendment is concerned only with intrusions of privacy as the right to secrecy rather than as the right to solitude. To be sure, there is a distinction between these aspects of privacy, but not one that should bar the applicability of the fourth amendment in the limited and unique circumstances of this case.[2] Along with the right to secret one's effects, or words, or actions, the right of privacy encompassed by the fourth amendment protects—in Justice Brandeis' words, dissenting in *Olmstead*—"the right to be let alone," giving the individual the right to isolate himself from unreasonable government intrusions. In my view, there are few infringements of privacy greater than denying the enjoyment of one's home. Arrests—in which police figuratively, and often literally, remove the individual from the home, in contrast to taking the home from the individual—involve the most comparable deprivation of privacy. An arrest gives police the right to search the individual, but the applicability of the fourth amendment's protections to police conduct during arrests does not turn on whether or not they conduct a search incident to the arrest, so the invasion of privacy must be inherent in the arrest itself. The majority acknowledges the invasion of privacy inherent in arrests, *ante* at 1078, but does not address *how* an arrest invades privacy in any sense other than as an interference with the arrestee's right to solitude.

The analogy between an arrest and the police involvement in the seizure of the Soldals' trailer is easily seen when we consider what happened to Edward Soldal the next day. When Mr. Soldal returned to the trailer park to retrieve two of his children (whom he had left with a neighbor for the night after he was evicted from the trailer park), police arrested him for trespassing. That seizure gave Mr. Soldal a fourth amendment claim, even though it was merely a continuation of the previous day's attempts to evict the Soldals from the trailer park. We all agree that Mr. Soldal has a valid fourth amendment claim because the arrest was made without probable cause to believe that he was a trespasser; why, then, does he not raise a valid fourth amendment claim with regard to the seizure of his home when police had no more basis for assisting in the eviction? Suppose that the police had been requested to usher Mr. Soldal and his family from the trailer park *before* their trailer was towed away. In that case, the Soldals would have a fourth amendment claim stemming from the forcible removal from the premises; why should they lose the claim when police first help to remove their home, giving them no choice but to leave?

I am not, of course, suggesting that the seizure of *any* private property is an in-

1. My dissent is directed toward only the Soldal's fourth amendment claim regarding the seizure of their trailer. As I indicated in my dissent to the panel opinion, I concur in the remand of Mr. Soldal's fourth amendment claims arising from the subsequent unlawful arrests.

2. To the extent that the fourth amendment affords different degrees of protection to these aspects of privacy, a stronger argument can be made for extending greater protection to the right of privacy as solitude rather than as secrecy. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 639 (3d ed. 1986).

fringement of privacy, for most property affords little privacy to persons as opposed to their effects. Indeed, the home appears *sui generis* in this important but limited regard. Taking a pen does not compromise the privacy of its owner's person, nor does seizing a container in which personal effects are stored. An automobile might, at one time, have been thought to afford privacy to its occupants (as well as to their possessions), but that era is past. *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1979). By contrast, the right to privacy a home affords its residents, whether by sheltering their possessions or their persons from government interference, has always been at the core of the fourth amendment's protections. "[T]he Court since the enactment of the Fourth Amendment has stressed 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic,'" for it is the home that, more than any other location, "provide[s] the setting for those intimate activities that the Amendment is intended to shelter from government *interference or surveillance*." *Oliver v. United States*, 466 U.S. 170, 178–79, 104 S.Ct. 1735, 1741, 80 L.Ed.2d 214 (1984) (quoting *Payton v. New York*, 445 U.S. 573, 601, 100 S.Ct. 1371, 1387, 63 L.Ed.2d 639 (1980) (emphasis supplied)).

The majority's resort to *United States v. Lindsey*, 877 F.2d 777 (9th Cir.1989), puzzles me, as I conclude that the case clearly illustrates my point. The majority acknowledges that when, as in *Lindsey*, police secure a home without searching it, they violate the residents' fourth amendment rights. The Soldals allege that police violated their fourth amendment rights in almost exactly the fashion described in *Lindsey*—in both cases police action intruded upon the personal privacy of the occupants of the homes by eliminating their ability to isolate themselves within their residences—except that in this case instead of physically occupying the house, it is as if the police surrounded the exterior of the home and denied the residents access to it.[3] It seems to me that such an intrusion is every bit as "palpable" as the intrusion described in *Lindsey*.

In my judgment, the analogy to arrest leads to a broader, though no less telling, indictment of the majority's position. I respectfully suggest that the fourth amendment is not concerned exclusively with privacy. Indeed, the Court expressly rejected that view in *Katz v. United States*, the case the majority heralds as the confirmation that privacy alone is the fourth amendment's province. *See* 389 U.S. at 350, 88 S.Ct. at 510 ("[the Fourth Amendment] protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all."). The analogy I draw between arrests and the seizure at issue in this case underscores the point. In the face of case law that states the proposition explicitly, the majority opinion recognizes that arrests implicate the fourth amendment not only because they invade privacy but also because they restrict liberty. *Ante* at 1080. Indeed, the opinion further observes that property seizures that infringe the property owner's liberty to go about his business implicate the fourth amendment as well. *Id. United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), makes that point, and it is an instructive case for this and other reasons.

In *Place*, police detained the luggage of a suspected narcotics trafficker for three days before they obtained a search warrant. The police took custody of the bags initially while they made arrangements to have a narcotics dog sniff them; after the

3. In my view the distinction is largely irrelevant to fourth amendment analysis. Securing a home is a seizure that intrudes upon the solitude of the residents whether accomplished by an entry into the home or by surrounding its perimeter. Similarly, both methods "interfere to the same extent with the possessory interests of the owners." *Segura v. United States*, 468 U.S. 796, 811, 104 S.Ct. 3380, 3389, 82 L.Ed.2d 599 (1984) (Burger, C.J., joined by O'Connor, J.). More on this in a moment. In any event, whether it constitutes an invasion of privacy as solitude, an interference with possession, or both, securing a home is actionable under the fourth amendment, and that is the point recognized by the court in *Lindsey*.

dog arrived and alerted to one of the bags some 90 minutes later, police retained the bags over the weekend until they could obtain a warrant from a magistrate on the following Monday morning. The Supreme Court held that although no search of the bags had occurred because the invasion of privacy entailed by the dog sniff was virtually nonexistent, 462 U.S. at 707, 103 S.Ct. at 2644, the bags had been unlawfully seized because the police had intruded "on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary." *Id.* at 708, 103 S.Ct. at 2645.

I find the majority's nod to *Place*, *ante* at 1079, to be misplaced in light of the reasoning employed and the result reached by the Court in that case. If the detention of luggage for even 90 minutes was an unreasonable deprivation of liberty in *Place*, *see* 462 U.S. at 709–10, 103 S.Ct. at 2645–46, I cannot concur with the majority's view that there was *no* deprivation of the Soldals' liberty interests, reasonable or otherwise, when their home was illegally towed away. Place, whom the police had some reason to suspect of criminal activity, was inconvenienced by the loss of the clothing, personal effects, and, of course, the cocaine, his bags contained. The Soldals, whom police had no reason to suspect of any wrongdoing whatsoever, were deprived of the occupancy of their home. The members of the majority apparently believe that Place suffered a greater loss. I do not.

Perhaps even more distressing than the majority's conclusion that the police *did not* restrict the Soldals' liberty is its acknowledgement that the police *did* disrupt their possessory rights. The concession is disturbing, because the majority goes on to hold that the disruption is not actionable under the fourth amendment because it was not attended by any invasion of privacy. That position strikes me to be at odds with the myriad cases in which the Supreme Court has affirmed that the fourth amendment's proscription against unreasonable seizures shields the individual's *possessory* interest in the property seized—an interest altogether different than the individual's *privacy* interest in the property. The majority does not address the Court's statement in *Place* that the seizure violated the fourth amendment because it unreasonably infringed "the suspect's possessory interest in his luggage." 462 U.S. at 708, 103 S.Ct. at 2645. Nor does it heed cases like *Rakas v. Illinois*, in which the Court explicitly recognized that although a search of a home (and by extension, a car) does not violate any legitimate expectations of privacy of visitors in the home, those visitors could nonetheless "contest the lawfulness of the seizure of evidence ... if their own property were seized during the search." 439 U.S. 128, 142 n. 11, 99 S.Ct. 421, 430 n. 11, 58 L.Ed.2d 387 (1978). *See also United States v. Salvucci*, 448 U.S. 83, 91 n. 6, 100 S.Ct. 2547, 2552 n. 6, 65 L.Ed.2d 619 (1980) ("Legal possession of the seized good may be sufficient in some circumstances to entitle a defendant to seek the return of the seized property if the seizure, as opposed to the search, was illegal."); *United States v. Jackson*, 585 F.2d 653, 657 (4th Cir.1978) (defendant's ownership of a bag containing gambling receipts found in car belonging to another gave him standing to contest seizure of the bomb though not the search of the car) (citing *United States v. Lisk*, 522 F.2d 228, 230–31 (7th Cir.1975) (Stevens, J.), *cert. denied*, 423 U.S. 1078, 96 S.Ct. 865, 47 L.Ed.2d 89 (1976)). It devotes little attention to cases like *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (198[illegible] in which the Court held that by asserting control over a package that had already been opened and searched by private parties, federal agents "seized" the package for purposes of the fourth amendment even though the agents did not invade the privacy of the package's owner when they seized it. *Id.* at 120–21, 104 S.Ct. at 1660. *See also Autoworld Specialty Cars v. United States*, 815 F.2d 385, 389 (6th Cir.1987) (seizure by customs agents of automobiles displayed in public showroom subject to fourth amendment despite lack of invasion of privacy); *United States v. Bagley*, 772 F.2d 482, 490 (9th Cir.1985) (towing of lawfully parked car belonging to suspect who had not been

apprehended "constituted a seizure within the meaning of the fourth amendment"); *United States v. Roberts*, 644 F.2d 683, 688 (8th Cir.1980) (en banc) (seizure by police of marijuana discovered by private party in rental storage unit actionable under fourth amendment). The majority does suggest that *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974), supports its view, but does not explain that although no search or seizure took place when police obtained paint scrapings from the car, a seizure did occur when the police towed the car away. *Id.* at 593, 94 S.Ct. at 2470. Another seizure occurred when police assisted in towing the Soldals' home away.

The Court's most recent affirmation, in 1990, of the fourth amendment's applicability when government officials interfere with possessory interests is, I submit, also its most plain. Consider the language of *Horton v. California*, — U.S. —, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990):

> The right to security in person and property protected by the Fourth Amendment may be invaded in quite different ways by searches and seizures. A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property. The "plain view" doctrine is often considered an exception to the general rule that warrantless searches are unreasonable, but this characterization overlooks the important difference between searches and seizures. If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy. *A seizure of the article, however, would obviously invade the owner's possessory interest.*

110 S.Ct. at 2306 (footnotes and citations omitted; emphasis added). For that reason, the seizure at issue in *Horton* was subject to fourth amendment analysis. I see no way to square the Supreme Court's view that seizures, even in the absence of an invasion of privacy, implicate the fourth amendment, with the majority's view that they do not.

Unlike the majority, I do not read *Hudson v. Palmer* to have fundamentally altered this longstanding tenet of the Supreme Court's fourth amendment jurisprudence. In that case, prison authorities seized a ripped pillow case found in an inmate's cell during a "shakedown" search; the Court held that the prisoner did not have a cause of action under the fourth amendment. The majority says that *Palmer* shows the fourth amendment does not protect property interests because if it did the prisoner would have been able to invoke the fourth amendment to challenge the seizure of the pillowcase even if he were unable to challenge the search itself. *Palmer*'s result, however, was premised on the Court's conclusion that prison inmates have neither privacy *nor possessory* rights in property maintained in their jail cells. 468 U.S. at 527–28 & n. 8, 104 S.Ct. at 3200–01 & n. 8 (rejecting seizure claim "for the same reasons"); *id.* at 538, 104 S.Ct. at 3206 (O'Connor, J., concurring) ("The fact of arrest and incarceration abates all legitimate Fourth Amendment privacy and possessory interests in personal effects...."); *id.* at 542, 544–45, 104 S.Ct. at 3208, 3209–10 (Stevens, J., dissenting) (rejecting majority's position that prisoner's have no privacy or possessory interests in their property); *see also* W. LaFave, Search and Seizure §§ 2.4(d), 10.9(a) (2d ed. 1987). The Court's holding, then, was limited to the prison environment, making the case particularly unsuited to carry the burden heaped upon it by the majority.

Troubled as I am by the majority's interpretation of binding precedent, consider why, under the majority's approach, *any* seizure, whether made in the course of a law enforcement investigation or a civil property dispute, should be subject to the strictures of the fourth amendment. When police seize a suspect's personal effects after a search, the seizure does not implicate the suspect's right to privacy. As *Horton* and *Place* explain, and the majority apparently agrees, the invasion of privacy attends the search rather than the seizure. Why, then, does the majority treat a search as a prerequisite to a seizure under the fourth amendment? If the fourth amendment protects only privacy interests, it should not be employed to bar even those

seizures that have been preceded by a search since the seizure itself does not infringe privacy. The majority ties these two distinct concepts together because it assumes that a seizure is the object of the invasion of privacy—"police search in order to seize." *Ante* at 1079. That assumption, I believe, misconceives the investigatory process. Police search to uncover information (therein lies the invasion of privacy); they seize for other reasons, usually to gather evidence to present at trial (therein lies the disruption of possession). This case illustrates another, albeit objectionable, reason police might seize private property. In neither case are seizures a necessary incident of a successful search—police can present evidence of the results of a search or investigation by means of their own testimony. *Cf. United States v. Jacobsen*, 466 U.S. 109, 119, 104 S.Ct. 1652, 1659, 80 L.Ed.2d 85 (1984). The fourth amendment governs seizures, but not, as the majority asserts, because they are inextricably bound up with searches.[4] The reason is simply that the plain language of the fourth amendment guarantees the right to be secure against both "unreasonable searches *and* seizures."

The fourth amendment guarantees that right to the average citizen as well as to the average criminal. The outcome of this case highlights the anomaly, to which I adverted in my original dissent to the panel opinion, created by the majority's desire to restrict the scope of fourth amendment protections to cases in which the police, or other state actors, are engaged in investigative activity. That approach would extend greater fourth amendment protection to those suspected of crimes than to those against whom the police harbor no suspicions at all. *See* 923 F.2d at 1253. Unlike the majority, I do not find this to be a "superficial" concern. Neither, apparently, has the Supreme Court, which has found it necessary on repeated occasions to reiterate that the applicability of the fourth amendment does not turn on whether the victim of a search or seizure was the object of police suspicion. *See, e.g., O'Connor v. Ortega*, 480 U.S. 709, 714–15, 107 S.Ct. 1492, 1496, 94 L.Ed.2d 714 (1987) (searches and seizures by government employers of the private property of employees subject to fourth amendment) (plurality opinion); *Wyman v. Jones*, 400 U.S. 309, 317, 91 S.Ct. 381, 385–86, 27 L.Ed.2d 408 (1971) ("one's Fourth Amendment protection subsists apart from his being suspected of criminal behavior"); *Camara v. Municipal Court*, 387 U.S. 523, 530–31, 87 S.Ct. 1727, 1732, 18 L.Ed.2d 930 (1967) ("even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority"); *Go-Bart Co. v. United States*, 282 U.S. 344, 357, 51 S.Ct. 153, 158, 75 L.Ed. 374 (1931) ("[the fourth amendment] protects all, those suspected or known to be offenders as well as the innocent"); *Weeks v. United States*, 232 U.S. 383, 392, 34 S.Ct. 341, 344, 58 L.Ed. 652 (1914) ("This protection reaches all alike, whether accused of crime or not....").

To fully appreciate the incongruous nature of the majority's position, one must also consider how this case might have played out had the police acted more reasonably. Imagine that the sheriffs had been less willing to accommodate the Soldals' landlord when she told them that she wanted the Soldals out because they were behind in their rent. Suppose that instead of immediately assisting the landlord's employees, the police had forced Mr. Soldal to show them his lease, threatening to have his trailer towed away if he did not comply with their demand. Had the police done nothing further, they would certainly have disrupted the lives of the Soldals far less than they did when they helped to seize the trailer. And yet, under the majority's view, the Soldals might nevertheless have a fourth amendment cause of action—relating to the coerced "search" for the lease—when they would have no fourth amendment action if the police had dispensed with any investigation and had simply taken their cue from the landlord. Such a result, I suggest, has little to recommend it.

The majority nevertheless endorses this outcome. My colleagues apparently fear that recognizing the Soldals' fourth amendment claim will unleash in the federal courts a torrent of litigation stemming from private repossessions.[5] As I do not believe that government officials routinely ignore the law and evict people from their homes solely at the whim of private creditors, I do not share that concern. Even assuming for a moment that the incidence of such conduct is significant, it would not justify denying access to the federal courts to redress a meaningful constitutional injury. The majority's concern stems from its insistence on characterizing this case as a "garden variety" property dispute, but when police embroil themselves in such disputes, I submit that they lose their generic quality. This is not, as the majority alleges, an ordinary dispute between landlord and tenant, nor is it a case in which the police merely tried to "keep the peace." This is a troubling case in which the claim is that a landlord and the local police illegally teamed up to dislodge a man's home from its moorings and towed it away simply because they both found him disagreeable. I see *nothing* ordinary about this course of events, nor can I view it as a simple case of jumping the gun on otherwise constitutional state procedures.

The majority claims that the Soldals had other constitutional remedies available to them; their claim, says the court, is really a procedural due process claim that must be brought in state court if adequate remedies are available there. The Soldals' claim is no more a procedural due process claim, however, than is *any* fourth amendment claim; indeed, it is less so. A warrantless search may be "reasonable," in the sense that it is based on probable cause, and nevertheless violate the fourth amendment simply because those conducting the search failed to comply with the warrant procedures prescribed by law. *Katz*, 389 U.S. at 356–57, 88 S.Ct. at 514. Here, the police neither complied with the eviction procedures required by law nor (so far as we know) had any basis for believing that the eviction was warranted substantively.

As I pointed out in my original panel dissent, the Court in *Zinermon v. Burch* used a fourth amendment violation as the paradigmatic example of a case in which a plaintiff "may bring a § 1983 action for an unlawful search and seizure despite the fact that the search and seizure violated the State's Constitution or statutes, and despite the fact that there are common-law remedies...." 494 U.S. 113, 110 S.Ct. 975, 982–83, 108 L.Ed.2d 100 (1990). The Court explained that procedural due process claims are those in which "the deprivation by state action ... is not in itself unconstitutional." *Id.* As we have seen, unreasonable seizures are unconstitutional in and of themselves, and *Zinermon* should therefore set to rest any attempt to invoke the availability of state remedies as a ground for denying fourth amendment claims.[6]

4. To be sure, that a seizure has been preceded by a lawful invasion of privacy can be *relevant* to whether the seizure itself is reasonable. *See Jacobsen*, 466 U.S. at 120–22, 104 S.Ct. at 1660–61. But that is not to say that the applicability of the fourth amendment turns on an invasion of privacy but only that whether there has been a lawful invasion of privacy bears upon whether a subsequent seizure comports with the amendment's requirement of reasonableness. In the same way, the length of the deprivations suffered may be relevant to the reasonableness of the police actions, but not to the question of whether the fourth amendment applies at all. *Place*, 462 U.S. at 708–09, 103 S.Ct. at 2645.

5. Judge Easterbrook goes the majority one better, raising the specter that recognizing the Soldals' fourth amendment claim would open the flood gates to negligence claims clothed in the fourth amendment. Specter it is, though, because a seizure is the product of an intentional application of force, a point *California v. Hodari D.*, — U.S. —, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), underscores.

6. Respectfully, Judge Easterbrook's reference to *Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960), puts the cart before the horse. The issue here is whether there has been a seizure within the meaning of the fourth amendment, not whether the seizure was reasonable. *Elkins* states that compliance with state procedures is not the benchmark of fourth amendment reasonableness. It, like *Zinermon*, rejects the view that the fourth amendment's scope depends on either the availability or adequacy of state procedures. As for the "reasonableness" of the seizure, I note only that the majority opinion acknowledges that the deputies did more than "keep the peace" and that we have held that in damages suits for alleged civil

This point was apparently not lost on the Soldals, who never attempted to characterize their claim as one for procedural due process, a fact acknowledged in the original panel opinion. *See* 923 F.2d at 1248.

Zinermon notwithstanding, the majority claims that *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), supports its approach. Once again, however, the majority and I part company over precedent. I would argue that *Graham* does not, as the majority claims, stand for the principle that the dominant *character* of the conduct challenged in a section 1983 case determines the only constitutional standard under which the case may be evaluated; that would mean that civil rights plaintiffs would be obliged to choose a single constitutional provision in which to ground their suits, even when the alleged infringement encompasses more than one constitutional provision (say, for example, the first and fourth amendments, as in cases where the authorities seize allegedly obscene materials not for evidentiary purposes but simply to destroy them; these seizures must be reviewed under both the first *and* the fourth amendments—*see Heller v. New York*, 413 U.S. 483, 491, 93 S.Ct. 2789, 2794, 37 L.Ed.2d 745 (1973)). *Graham* is more accurately described, as it was in *Schroeder v. City of Chicago*, 927 F.2d 957, 961 (7th Cir.1991) (Posner, J.), as establishing a preference for grounding section 1983 actions in specific provisions of the bill of rights where possible rather than relying on the more inchoate protections afforded by the doctrine of substantive due process. *See* 490 U.S. at 395, 109 S.Ct. at 1871 ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."). In this light, the majority's view that *Graham* requires the Soldals to rely on the due process clause in any fashion when they have a cause of action under the fourth amendment seems untenable.[7]

In an era in which "reasonable expectations of privacy" seem to be diminishing, preserving the sanctity of the home becomes all the more critical. We take too lightly "the right to be let alone" when we conclude that the fourth amendment has no possible relevance to a claim that deputy sheriffs, in contravention of the laws they are charged to know and uphold, helped roust a family from their home and cart it away at the behest of a trailer park manager. That is exactly the type of governmental intrusion that the fourth amendment regulates, whether we label the intrusion one of privacy, property, or liberty. The majority believes that we should recognize one more "fine distinction" in fourth amendment law—one that I find nowhere evident in the language of the amendment itself or the opinions of the Supreme Court—to stem an anticipated onslaught of fourth amendment *poseurs*. That belief provides little justification for hastening the demise of the most significant citadel of solitude available to Americans. The majority opinion does not merely nibble at the margins of the fourth amendment's protections; it gnaws at their very core. Some thirty years ago, dissenting from the Supreme Court's refusal to address the merits of a challenge to a Connecticut law prohibiting the use of contraceptives by married couples in *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961), Justice Harlan anticipated and addressed precisely the argument the majority surfaces today, and I cannot improve upon his analysis:

> [I]t must be acknowledged that there is another sense in which it could be argued that this intrusion on privacy differs from what the Fourth Amendment ... [was] intended to protect: here we have not an intrusion into the home so much as on the life which characteristically has its place in the home. But to my mind the home derives its preeminence as the seat of family life.

Id. at 551, 81 S.Ct. at 1781. The majority's opinion compromises that preeminence, and I am therefore obliged to dissent.

7. This is particularly true in light of the fact that the Soldals raised a *substantive* due process claim, but the original panel majority chose not to address it. *See* 923 F.2d at 1251.

rights violations involving the fourth amendment, the reasonableness of police action is a question of fact for the jury. *Llaguno v. Mingey*, 763 F.2d 1560, 1565 (7th Cir.1985) (*en banc*).

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of Union National Bank of Chicago, Plaintiff-Appellant,

v.

Lillian WRIGHT, also known as Lillian Wright Lawler, Defendant-Appellee.

No. 90-2217.

United States Court of Appeals, Seventh Circuit.

Argued Feb. 26, 1991.

Decided Aug. 29, 1991.

Federal Deposit Insurance Corporation (FDIC), in its capacity as receiver of failed bank, sued former director of bank for amounts allegedly due under three facially unconditional notes signed by her. The United States District Court for the Northern District of Illinois, Brian Barnett Duff, J., denied FDIC's motion in limine seeking to bar borrower's lack of consideration defense on basis of *D'Oench* doctrine and found for borrower on each of three notes. FDIC appealed. The Court of Appeals, Ripple, Circuit Judge, held that: (1) FDIC was entitled to raise amendment to statute making *D'Oench* doctrine applicable to FDIC as receiver for first time on appeal; (2) amended version of statute making *D'Oench* doctrine applicable to FDIC as receiver could be applied retroactively; (3) *D'Oench* doctrine was applicable even though borrower did not intend to defraud; (4) FDIC could raise reasonable inference of loans' validity by resting solely upon assertion that as general practice it did not remove written instruments from closed or inactive files once bank had been closed; and (5) letter indicating that one note had been satisfied from funds held in director's escrow account did not satisfy requirements of statute codifying *D'Oench* doctrine so as to raise defense of discharge of loan obligation.

Reversed.

1. Federal Courts ⇐617

Failure of Federal Deposit Insurance Corporation (FDIC) to raise amendment to statute codifying *D'Oench* doctrine making statute directly applicable to FDIC in its receiver capacity as bar to borrower's defense of lack of consideration in trial court did not preclude FDIC from raising issue on appeal, where, in substance, argument was actually raised by FDIC, although FDIC misstated law, and it was unclear whether Congress intended protections afforded FDIC under statute to be waived by failure to assert, specifically, right to those protections. Federal Deposit Insurance Act, § 2(13)(e), as amended, 12 U.S.C.A. § 1823(e).

2. Banks and Banking ⇐502

Amendment to statute codifying *D'Oench* doctrine making doctrine applicable to Federal Deposit Insurance Corporation in its capacity as receiver could be applied retroactively, where retroactive application would not infringe upon matured right held by borrower or impose any new obligation upon her without notice. Federal Deposit Insurance Act, §§ 2[11], 2(13)(e), as amended, 12 U.S.C.A. §§ 1821, 1823(e).

3. Banks and Banking ⇐506

D'Oench doctrine barred borrower's defense that facially unqualified notes lacked consideration due to side agreement with bank that notes would not be payable

APPENDIX B

SERIES

sponsible for estimating the ex-
of future claims to the company
es of financial planning.

ng whether this evidence estab-
amount of damages with the
rtitude, we are mindful that
does not require impossibilities;
therefore require a higher de-
tainty than the nature of the
.'" *Pierce v. New York Cent.*
.2d 1392, 1398 (6th Cir.1969)
ison v. Chandler, 11 Mich. 542,
see also Restatement (Second)
12 (1977). "'And when, from
f the case, the amount of dam-
t be estimated with certainty
see no objection to placing
ury all the facts and circum-
e case, having any tendency to
es, or their probable amount;
ıble them to make the most
d probable estimate which the
e case will permit.'" *Story*
282 U.S. at 564, 51 S.Ct. at 251
son, 11 Mich. at 555–56). Al-
question is a close one, we
Broan's evidence of damages
vn with as much certainty as
f the tort and the circum-
t. The expert testimony of-
brink provided "a sufficient
jury's computation of the
low, 327 U.S. at 266, 66 S.Ct.
nishing data from which the
probable loss could be ascer-
natter of reasonable infer-
an Kodak Co. v. Southern
ls Co., 273 U.S. 359, 379, 47
71 L.Ed. 684 (1927). Finally,
roperly instructed that the
nages could not be deter-
culation or conjecture but
on evidence showing a rea-
f computation, although the
ly be approximate. There-
ide that the District Court
allowing the jury to award
staken future product liabil-

award of damages for mis-
ability claims was proper,
of determining how much

of the jury award was for such claims and, therefore, we cannot affirm any particular award. Because we must remand for presentation of Broan's lost future profits theory the entire damages case must be retried.

[5] One additional matter that must be addressed on retrial is that of reducing any future damages to their present value. It is elementary that in cases of present allowance for future loss a defendant is entitled to a discount to present value for the advance payment. *See, e.g., Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 339, 108 S.Ct. 1837, 1844, 100 L.Ed.2d 349 (1988) ("'[D]amages awards in suits governed by federal law should be based on present value.'") (quoting *St. Louis Southwestern Ry. v. Dickerson*, 470 U.S. 409, 412, 105 S.Ct. 1347, 1349, 84 L.Ed.2d 303 (1985)).

[6, 7] Finally, Associated and Republic argue that even if this Court is inclined to allow mistaken product liability claim damages, those damages should be awarded in the form of a declaratory judgment ordering an accounting of such damages as they are incurred by Broan in the future. It is true that such a remedy would seemingly eliminate the need for any projections of future claims. However, this remedy was considered by the District Court and was not adopted. The decision whether to grant a declaratory judgment and more generally the decision regarding the appropriate recovery to be afforded under the Lanham Act rests in the sound discretion of the District Court. *See* 15 U.S.C. § 1117(a); *Dresser Indus., Inc. v. Insurance Co. of North America*, 358 F.Supp. 327, 330 (N.D.Tex.), *aff'd*, 475 F.2d 1402 (5th Cir.1973). In view of the potential problems presented by such prospective relief we cannot say that the District Court abused its discretion in refusing to grant declaratory relief in lieu of present money damages.

V.

This Court may grant a partial new trial limited to the issue of damages if damages are sufficiently separate that a new trial on damages would be fair. *See Gasoline Pro. Co. v. Champlin Refining Co.*, 283 U.S. 494, 498–99, 51 S.Ct. 513, 514–15, 75 L.Ed. 1188 (1931); 6A Moore's Federal Practice ¶ 59.06 (2d ed. 1979). In this case the damages issues are adequately distinct from the liability questions that a new trial on damages alone is appropriate.

Accordingly, we AFFIRM the allowance of damages for future mistaken product liability claims, we REVERSE the District Court's refusal to allow evidence of lost profits damages, and we REMAND for a partial new trial on the issue of damages.

Edward SOLDAL and Mary Soldal, individually and as legal guardians for Jimmy Soldal, Alena Soldal, Joseph Soldal and Jessie Soldal, Plaintiffs–Appellants,

v.

COUNTY OF COOK, et al., Defendants–Appellees.

No. 89–3631.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 14, 1990.

Decided Jan. 24, 1991.

Trailer park tenants brought action against county, officers of sheriff's office, landlord, park manager, and other private individuals to recover for conspiracies to damage trailer during eviction and to unlawfully arrest tenant. The United States District Court for the Northern District of Illinois, Charles P. Kocoras, J., dismissed claims. Tenants appealed. The Court of Appeals, Posner, Circuit Judge, held that: (1) unlawful eviction deprived tenants of procedural, not substantive, rights, and,

thus, damage to trailer and deprivation of use as result of eviction did not violate substantive due process; (2) removal of trailer was not search or seizure under Fourth Amendment; and (3) alleged arrests for trespass and criminal assault were unlawful.

Affirmed in part, reversed in part, and remanded.

Flaum, Circuit Judge, concurred in part, dissented in part, and filed opinion.

1. Constitutional Law ⇐278.3
Landlord and Tenant ⇐388

Physical damage to tenant's trailer during eviction was deprivation of due process property interest. U.S.C.A. Const. Amends. 5, 14.

2. Constitutional Law ⇐278(1)

"Deprivation" is state of being deprived of something and comes into being when due process property interest is taken from owner; what happens to property—whether it is used by someone else or destroyed—is irrelevant. U.S.C.A. Const. Amends. 5, 14.

See publication Words and Phrases for other judicial constructions and definitions.

3. Civil Rights ⇐198(4)

Judgment could be obtained against private defendants in § 1983 action only if private defendants were in cahoots with deputy sheriffs involved in eviction and arrest of trailer park tenant. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amends. 4, 5, 14.

4. Conspiracy ⇐19

Trailer park manager's call for deputy sheriffs to be present at scene of expected violence, eviction of tenants, did not establish conspiracy between deputies and manager.

5. Conspiracy ⇐2

Conspiracy is agreement, and police do not enter into agreement with complainant when they arrest person upon complaint, thereby doing their duty to enforce law, or when they stand by at scene of potential violence, hoping by their presence to deter breach of peace.

6. Conspiracy ⇐2

Conspiracy comes in when private persons and public police agree to act jointly to achieve common end.

7. Landlord and Tenant ⇐392

Trailer park tenants could be evicted under Illinois law only if landlord had eviction order. Ill.S.H.A. ch. 110, ¶¶ 9–101 et seq.

8. Landlord and Tenant ⇐388

Trailer park tenant had a right to use "mild force"—force not intended or likely to cause actual physical injury—to prevent destruction of property during unlawful eviction. Ill.S.H.A. ch. 38, ¶ 7–2.

See publication Words and Phrases for other judicial constructions and definitions.

9. Civil Rights ⇐198(7)
Constitutional Law ⇐254(2)

Deputy sheriffs' presence that prevented trailer park tenant from exercising statutory right to defend his property during unlawful eviction was "state action" for purposes of due process clause and § 1983. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amends. 5, 14; Ill.S.H.A. ch. 38, ¶ 7–2; ch. 110, ¶ 9–101 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

10. Constitutional Law ⇐278.3

Deputy sheriffs' alleged acts depriving trailer park tenant of procedural rights to hearing before eviction did not violate procedural due process, where pecuniary damage to trailer could be recovered in trespass suit against landlord. U.S.C.A. Const. Amends. 5, 14; Ill.S.H.A. ch. 38, ¶ 7–2; ch. 110, ¶ 9–101 et seq.

11. Civil Rights ⇐209

Denial of procedural rights as result of random and unauthorized acts of subordinate public officers is not actionable in suit under § 1983 unless plaintiff lacks adequate remedies under state law. 42 U.S.C.A. § 1983.

12. Civil Rights ⇐209

Existence of adequate state judicial remedies is no bar to maintenance of suit for violation of substantive due process. U.S.C.A. Const.Amends. 5, 14.

13. Eminent Domain ⇐131

If government takes private property for public use, it need only pay owner fair market value of property. U.S.C.A. Const. Amend. 5.

14. Eminent Domain ⇐61

If government takes private property for private use, taking is not privileged by takings clause. U.S.C.A. Const.Amend. 5.

15. Constitutional Law ⇐278.3

Unlawful eviction of trailer park tenants was denial of procedural, rather than substantive, rights under Illinois law, and, thus, deprivation of use of trailer and damage to trailer in presence of deputy sheriffs did not violate substantive due process. U.S.C.A. Const.Amends. 5, 14; Ill.S.H.A. ch. 38, ¶ 7–2; ch. 110, ¶ 9–101 et seq.

16. Searches and Seizures ⇐13

Removal of trailer from trailer park during unlawful eviction of tenant in presence of deputy sheriffs was not "search" or "seizure" within meaning of Fourth Amendment. U.S.C.A. Const.Amend. 4; Ill.S.H.A. ch. 110, ¶ 9–101 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

17. Civil Rights ⇐209

Constitutional right that is not simply elementary due process right to notice and hearing is actionable under § 1983 regardless of adequacy of plaintiff's remedies under state law. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amends. 5, 14.

18. Searches and Seizures ⇐85

Physical damage to home inflicted in course of search or arrest or other seizure is actionable under Fourth Amendment. U.S.C.A. Const.Amend. 4.

19. Constitutional Law ⇐12
Statutes ⇐184

Statutes and constitutional provisions are not cabined to particular abuses that gave rise to enactment.

20. Arrest ⇐63.4(15)

Deputy sheriff who knew of trailer park manager's exclusion of tenant from park lacked probable cause to arrest tenant for trespass at trailer home of tenant's friend, in that Illinois' criminal trespass statute contained express exception for lessee's invitee. U.S.C.A. Const.Amend. 4; Ill.S.H.A. ch. 38, ¶ 21–3.

21. Arrest ⇐63.4(15)

Trailer park tenant was unreasonably arrested for criminal assault after allegedly inviting purported victim to step outside for fight, in that invitation was not assault under Illinois law. U.S.C.A. Const. Amend. 4; Ill.S.H.A. ch. 38, ¶ 12–1(a).

22. Assault and Battery ⇐48

Allegedly inviting someone to step outside for fight was not criminal assault under Illinois law. Ill.S.H.A. ch. 38, ¶ 12–1(a).

23. Assault and Battery ⇐48

Apprehension of imminent battery is not reasonable under Illinois law, if defendant's words, however otherwise threatening, expressly negative condition required for battery to occur. Ill.S.H.A. ch. 38, ¶ 12–1(a).

24. Conspiracy ⇐17

Mere fact that purported victim of assault filed criminal charges would not make him conspirator with sheriff's police.

25. Civil Rights ⇐206(4)

Harassment of trailer park tenants during eviction could not be imputed to county in § 1983 suit; harassment was isolated abuse of power of which sheriff and other officials were completely ignorant. 42 U.S.C.A. § 1983.

26. Civil Rights ⇐206(3)

Plaintiff seeking to make county liable under § 1983 for acts of deputy sheriffs must show direct involvement of policy-making level of sheriff's office in illegal

activity of its employees. 42 U.S.C.A. § 1983.

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Randolph M. Johnston, Office of the State's Atty., John J. George, Dennis J. Aukstik, Robert T. Oleszkiewicz, Daley & George, Chicago, Ill., for Margaret Hale and Terrence Properties Inc.

Before CUDAHY, POSNER, and FLAUM, Circuit Judges.

POSNER, Circuit Judge.

This matter is before us on the appeal of the plaintiffs, Edward Soldal and his family, from the dismissal of their civil rights suit (42 U.S.C. § 1983) on the defendants' motion for summary judgment. The defendants are Cook County, Illinois; several officers of the Cook County sheriff's office; Terrace Properties, which owns a trailer park in Elk Grove, Illinois; and Margaret Hale, the manager of the park, together with several other private individuals.

The Soldals had rented a lot in the park as a site for their trailer home, in which they lived with their four children. In August 1987, Terrace Properties filed a suit in an Illinois state court to evict the Soldals. A hearing was scheduled for September 22, but more than two weeks before then Hale called the Cook County sheriff's office to say that she was planning to evict a family that day (September 4) and that, because she feared that the family might resist being evicted, she wanted deputy sheriffs to be present. That afternoon two employees of Terrace Properties came to the Soldals' trailer accompanied by a deputy sheriff. The employees began by wrenching the sewer and water boxes off the side of the trailer home, causing damage to it. When Soldal asked the workers what they were doing, they told him to ask the deputy sheriff, which he did, and the reply was that "he [the deputy sheriff] was there to see that [Soldal] didn't interfere with [Terrace's] workers." The workers tore off the skirting and canopy of the trailer and hooked a tractor to it. Although they also disconnected the phone, Soldal called his lawyer from a pay phone and she in turn called the sheriff's office—which at first denied that there was any deputy sheriff on the scene. Getting no satisfaction, the lawyer advised Soldal, in a second conversation from the pay phone, to file a complaint against Terrace Properties for criminal damage to his property.

When Soldal returned to the trailer from the pay phone, he found two more deputy sheriffs at the scene. He told them that he wanted to file a complaint and they referred him to a lieutenant of the sheriff's police, who was in Hale's office. Soldal went there, and the lieutenant came out and told him to wait outside, then went back in and remained closeted with Hale and several other employees of Terrace Properties for twenty to thirty minutes. When he emerged he told Soldal to talk to the district attorney, then went back into the office. Re-emerging at the end of another half hour he told Soldal that he would not accept a complaint from him because "it was between the landlord and tenant ... [and] they were going to go ahead and continue to move out the trailer." The tractor now pulled the Soldals' trailer free from its moorings. Discussion about where it would be taken ensued, in the course of which Hale said to the lieutenant in Soldal's presence, "I'm going to tell him [Soldal] this in front of you [lieutenant], that he's not allowed to come back to the park," whereupon the lieutenant told Soldal, "Now, you heard what she said."

The Soldals went off to a motel for the night (Terrace Properties had offered to pick up the tab) but left two of their children with a friend who lived in another trailer home in the park. The next morning Soldal returned to the park to pick up

the children. He was seen entering the park, and while he was in the friend's trailer a deputy sheriff (who had not been present at the eviction the previous day) came and arrested Soldal because "you're not supposed to be here." He was kept in jail for several hours, charged with criminal trespass. The charge was later dropped.

Soldal continued making unsuccessful efforts to get the sheriff's office to accept a complaint from him. He had better luck in court. On September 9 the state court in which the eviction proceeding was pending found that Terrace Properties had not been authorized to evict the Soldals, and ordered Terrace to put the trailer back on the lot. This was done, but the trailer had been badly damaged during the eviction.

A month later one of the deputy sheriffs who had been involved in the eviction came to the Soldals' trailer, together with a man named Peterson, who had accused Soldal of having struck his car and now repeated the accusation. Soldal replied by accusing Peterson of lying and invited him to step out into the street. The invitation was not taken up but the deputy sheriff asked Peterson whether he wanted to press criminal charges, and when he said he did the deputy sheriff arrested Soldal. Soldal was charged with criminal assault, apparently based on the invitation to fight rather than on whatever earlier skirmishes led the police, with Peterson in tow, to his door. He was also charged with other crimes upon the complaint of two other private persons, who are named as defendants in this suit along with Peterson. But as there is no detail in the record concerning these additional charges and defendants, we ignore them except to note that the charges were later dropped, as was the charge of assaulting Peterson.

Our recital construes the facts as favorably to the plaintiffs as the record will permit. That is what we are supposed to do when deciding whether summary judgment should have been granted. Of course the true facts may turn out to be different and less favorable to the plaintiffs.

The complaint charges in effect two conspiracies. In the first, Terrace Properties and Margaret Hale are accused of conspiring with Cook County and the officers of the sheriff's police to damage the Soldals' trailer and to arrest him without cause. In the second, Peterson is accused of having conspired with Cook County and the officers (not all the same ones) to arrest Soldal a month later. Pendent counts recast the various claims as violations of state tort law as well. On the defendants' motion for summary judgment the district judge dismissed all the claims, both federal and state, on the merits. First of all he found that there had been no conspiracy. True, there was a puzzle: "if the Terrace Properties defendants were clearly committing a criminal trespass, why did the members of the Sheriff's Police who were present—and who were called to the scene by the evicting defendants—stand idly by and do nothing? A reasonable inference would be that they conspired with the private parties not to act." But the sheriff's police "were under no state-law duty to stop the eviction, and in fact were under an opposite duty to *not* intervene on either side unless some other infringement of the criminal code was committed.... [A] criminal trespass arrest and prosecution cannot be used as a means to determine the right to possession. *People v. Evans*, 163 Ill.App.3d 561, [114 Ill.Dec. 662], 516 N.E.2d 817 (1st Dist.1987)." (Emphasis in original.) As for the two arrests, they were based, the district court concluded, on probable cause.

To recover damages for having been deprived of their property without due process of law, the Soldals must show first that there was a deprivation of property, and second that it was a deprivation by officers of the state. Only after these questions are answered in the affirmative does the question whether there was a denial of due process arise.

[1, 2] The physical damage that Terrace's workers did to the trailer was a deprivation of property. To establish this proposition we begin by noting that if the property had been completely destroyed, this would have been as much a deprivation

as if it had been taken away. *Reed v. Village of Shorewood*, 704 F.2d 943, 949 (7th Cir.1983). Compare *United States v. General Motors Corp.*, 323 U.S. 373, 384, 65 S.Ct. 357, 362, 89 L.Ed. 311 (1945), which establishes that proposition for takings cases. "Deprivation" is the state of being deprived of something, and therefore comes into being when the property is taken from the owner; what happens to the property—whether it is used by someone else or destroyed—is an irrelevance. Severe damage is a partial but, we think, an actionable deprivation. Although we can find no cases on the point, a persuasive analogy is that temporary deprivations frequently have been held actionable under section 1983, as in *Tavarez v. O'Malley*, 826 F.2d 671, 674 (7th Cir.1987). We cannot see a principled difference between a temporary deprivation on the one hand and damage that reduces the present value of the property to the owner by the same amount, on the other. No doubt, trifling diminutions of value may be disregarded as not rising to the level of deprivations; but that is not a consideration in this case.

[3] But the workers who damaged the Soldals' trailer home were private employees. Only if they, or more plausibly their boss, Hale, were in cahoots with the deputy sheriffs involved in the eviction and arrest can the Soldals obtain a judgment against these private defendants. Of course, if the Soldals can get a judgment against the public defendants, then as a practical matter they do not need to be able to get a judgment against the private ones as well, since a plaintiff is not entitled to a duplicative recovery. The Soldals need not worry that the deputy sheriffs might be judgment-proof. The state will indemnify the deputy sheriffs against any judgment that might be entered, Ill.Rev.Stat. ch. 34, ¶ 5–1002; *Joseph v. Brierton*, 739 F.2d 1244, 1246 (7th Cir.1984), and this as a practical matter guarantees the collectibility of a judgment even if Cook County is dropped as a defendant, as we think it must be for the reasons stated at the end of this opinion.

So why have the Soldals charged conspiracy? Why have they not proceeded just against the public defendants? The answer is that they must have been concerned, rightly or wrongly (wrongly as we shall see), that since a mere failure by police to prevent a private person from damaging the property of another is not actionable under the Constitution, *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), the Soldals would not be able get a judgment against the public defendants, at least so far as the property damage inflicted during the eviction is concerned, unless they proved that the deputy sheriffs had conspired with the private defendants and hence were responsible for the acts of the private defendants committed in furtherance of the conspiracy.

[4–6] So let us consider whether there is any basis for supposing that there was such a conspiracy. We begin by noting that the fact that a private person calls the police to a scene of expected violence—even the fact that he persuades the police to arrest someone—does not establish a conspiracy between the police and him. *Gramenos v. Jewel Cos.*, 797 F.2d 432, 435 (7th Cir.1986); *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1352–53 (7th Cir.1985); *Johnson v. Miller*, 680 F.2d 39, 40–41 (7th Cir.1982). A contrary conclusion would vastly expand the reach of federal civil rights law, not only by bringing a myriad of private individuals within the law's scope but also by bringing most police inaction within its scope as well. These consequences are a reason for not letting the concept of conspiracy expand to its logical limits. And the concept itself would be deformed rather than completed by being interpreted to cover this most elementary of citizen-police interactions. A conspiracy is an agreement, and the police do not enter into an agreement with the complainant when they arrest a person upon his complaint, thereby doing their duty to enforce the law, or when they stand by at a scene of potential violence, hoping by their presence to deter a breach of the peace and in this case doing so successfully. As the cited cases explain, conspiracy comes in

when private persons and public police agree to act jointly to achieve a common end, here the removal of a troublesome tenant—troublesome, perhaps, to the police as well as to the landlord, for quite apart from having been behind in his rent, Mr. Soldal is apparently a quarrelsome fellow.

[7] One bit of indirect evidence of a conspiracy of this sort is that the deputy sheriffs—whose principal function after all is enforcing eviction orders—must have known that the trailer park had no right to evict the Soldals. To evict lawfully you need an eviction order, which Terrace Properties did not have. And the deputy sheriffs knew it did not have one. Terrace Properties had brought a proceeding to obtain such an order, but you cannot on the strength of filing a complaint proceed as if you had already won and obtained an order ready to be executed. All this is perfectly plain as a matter of Illinois law. As held in *People v. Evans*, *supra*—it is a mystery to us why the district judge cited this case, considering his conclusion—Illinois' Forcible Entry and Detainer Act, Ill.Rev.Stat. ch. 110, ¶¶ 9–101 *et seq.*, provides the exclusive remedy for recovering possession of land from a tenant who is in actual and peaceable, although not necessarily rightful, possession of the plaintiff's property. The plaintiff can obtain a judgment of eviction against the overstaying tenant but until he does so he has no authority to dispossess the tenant. Terrace Properties obtained no judgment of eviction, either before it dispossessed the Soldals or afterward.

Why then did the deputy sheriffs not stop the eviction, and why did they not accept the criminal complaint that Soldal wanted to file against the landlord who was dispossessing him and his family unlawfully? *People v. Evans* does not hold or suggest that the police must stand by while people use violence to enforce their claims of legal right. In that case, a tenant refused to sign a lease. The landlord told her to get out. She refused. The police arrested her on the landlord's complaint for criminal trespass. The court said this was the wrong way to proceed. The landlord should have obtained an eviction order. That is exactly what Hale should have done.

[8] Perhaps what the district judge had in mind in citing *Evans* is that Soldal, like the landlord in *Evans*, would not have been entitled to use self-help to prevent the removal and damage of his trailer. The deputy sheriff was on the scene to prevent him from exercising that self-help. But the situations are not symmetrical. Joyce Evans was sitting quietly in the house she had rented. She was not breaking things. There was no occasion to use force against her. Terrace's employees were destroying valuable property of the Soldals. Soldal would have been within his common law (now statutory) right of self-help to use mild force—force not intended or likely to cause an actual physical injury—to prevent that destruction. *M'Ilvoy v. Cockran*, 9 Ky. 271 (1820); Ill.Rev.Stat. ch. 38, ¶ 7–2. He certainly was entitled to call on the police to obviate the need for self-help by preventing what was undoubtedly a criminal trespass to his property, since the trespassers were not acting under even a colorable entitlement.

[9] Which shows by the way that this is not a case of inaction. Without the presence of the police, Mrs. Hale might have feared to order the forcible removal of the trailer from its moorings. The police prevented Soldal from exercising his statutory right to defend his property. That is state action. *Howerton v. Gabica*, 708 F.2d 380 (9th Cir.1983); *Booker v. City of Atlanta*, 776 F.2d 272, 273 (11th Cir.1985) (per curiam). It was therefore not necessary for the Soldals' lawyer to drag in conspiracy doctrine for the purpose of imputing the action of the private defendants to the public ones, or for any other purpose that we can see. But the plaintiffs have chosen to cast their claim as one of conspiracy, thereby raising the difficult question whether the sheriff's police were acting in agreement with Mrs. Hale or other agents of Terrace Properties in preventing Soldal from defending his property; so we shall soldier on. There is some evidence of agreement, beyond the scraps already men-

tioned. The terms in which the deputy sheriffs spoke to Soldal ("we're here to prevent you from interfering with Terrace's workers" and "you heard what she said") could be thought to imply that they considered themselves Hale's agents. Then there are those long confabs between the sheriff's lieutenant and Hale and other employees of Terrace. What were they all talking about? May they not have been discussing the best, albeit an illegal, way to get rid of a village pest?

An agreement is bilateral, however; so we must ask, what could there have been in it for the sheriff's office? Well, the sheriff's office may have regarded Soldal as a troublemaker and therefore have been happy to cooperate with Terrace Properties in getting rid of him. All this is terribly speculative, though—and in the end quite irrelevant. Suppose the Soldals *have* made out a prima facie case that Terrace and Hale conspired with public officers to circumvent the procedural protections to which Illinois law entitles tenants such as the Soldals, and in the course of the conspiracy damaged the trailer. Or suppose, forgetting conspiracy, that the plaintiffs have made out a prima facie case that the sheriff's police deprived them of the trailer, which was their property, and in the course of that deprivation damaged the trailer. Either way, the plaintiffs could not, at least as they have framed the case, obtain damages for the deprivation.

[10, 11] The denial of procedural rights as a result of the random and unauthorized acts of subordinate public officers—a good description of the acts of the deputy sheriffs in this case—is not actionable in a suit under section 1983 unless the plaintiff lacks adequate remedies under state law. *Zinermon v. Burch*, — U.S. —, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). The damage to the trailer was purely pecuniary, and can be recovered in a suit against Terrace Properties for trespass in violation of Illinois law. (We are perplexed that the Soldals did not append a state law trespass claim as a pendant to their constitutional claims.) The Soldals do not argue that such a remedy would be inadequate; make nothing of the fact that it would not be a remedy against the public defendants (and the briefs are silent about the existence or adequacy of a state law remedy against those defendants); do not argue that a pre-deprivation hearing would have been feasible; do not argue that, if such a hearing would have been feasible, a state law remedy that did not provide for one would be inadequate; make nothing of the fact that the deputy sheriff checked with his superiors during the eviction (but see *Easter House v. Felder*, 910 F.2d 1387, 1400 (7th Cir.1990) (en banc)). Finally, in their reply brief they forgo any claim to a denial of their procedural rights. We conclude that there is no issue of procedural due process before us.

[12–15] This does not end the matter, because in some cases, as the Soldals emphasize, a deprivation of property can be attacked as a violation of substantive due process, and then the existence of adequate state judicial remedies is no bar to the maintenance of the constitutional tort suit. *Zinermon v. Burch*, *supra*, 110 S.Ct. at 983. As a matter of federal constitutional law, if the government takes private property for a public use it need only pay the owner the fair market value of the property. But if it takes private property for a private use—say it takes the Soldals' trailer and gives it to Mrs. Hale because she is a personal friend of powerful public officials—then the taking is not privileged by the takings clause of the Fifth Amendment, viewed as a grant of power to the government to take a person's property upon payment of its fair market value ("just compensation"). It is then a naked deprivation of property, and the owner is entitled to get it back or, if that is infeasible, to obtain full common law damages. An action so conceived is a plausible, though not clearly proper, invocation of substantive due process, for reasons explained in *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464–66 (7th Cir.1988). But it is of no help to the Soldals. The defendants were not trying to take the trailer and give it to someone else; they were trying to make an eviction without providing the procedural safeguards to which Illinois law

entitles a tenant; they were denying the Soldals' procedural, not their substantive, rights. Cf. *Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc.*, 795 F.2d 1344 (7th Cir.1986).

It makes no difference if the focus is switched from the removal of the trailer from the trailer park to the physical damage done to the trailer in the process of eviction. Since there may be, we have conceded, cases in which the taking by public officers of private property for a private rather than for a public use can be construed as a denial of substantive due process, there may also be cases in which wanton, gratuitous damage to private property by public officers can be construed as a denial of substantive due process. But that is not the nature of the Soldals' allegation. Their allegation is that the eviction was unlawful—which it was—and *therefore* they are entitled to recover the costs that the eviction imposed on them, costs that include both the damage to the trailer and the deprivation of the use of the trailer. If the limitations on challenging procedural violations on constitutional grounds can be got round by charging every *consequence* of the violation as a denial of substantive due process, those limitations are down the drain; every procedural due process claim is convertible into a substantive due process claim by the facile expedient of slicing the claim into its constituent parts. If the eviction had been proper, the incidental costs to the Soldals could not be made the basis of a constitutional claim; if it was improper—and it *was* improper—it was improper because the *procedures* prescribed by state law were not complied with.

[16, 17] This would be the end of the Soldals' case so far as the alleged conspiracy to evict them is concerned had the defendants not carried off the Soldals' trailer. But they did, and the Soldals argue that by doing so they seized the trailer in violation of the Fourth Amendment. If they are right, then the case again is out of the realm of purely procedural due process (i.e., right to notice and hearing); and, to repeat, a constitutional right that is not simply the elementary due process right to notice and a hearing is actionable under section 1983 regardless of the adequacy of the plaintiff's remedies under state law.

[18, 19] The question whether a repossession conducted or assisted by state officers is actionable under the Fourth Amendment was left open in *Fuentes v. Shevin*, 407 U.S. 67, 96 n. 32, 92 S.Ct. 1983, 2002 n. 32, 32 L.Ed.2d 556 (1972), and no other case addresses it. We are pretty confident that the Supreme Court would answer "no" if the issue ever came before the Court. Literally, it is true, what the defendants did here was to "seize" the plaintiffs' trailer. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). And since the Fourth Amendment guarantees the right of the people to be secure in their houses, papers, and effects, as well as in their persons, against unreasonable searches and seizures, physical damage to a home inflicted in the course of a search, or of an arrest or other seizure, is actionable under that amendment. But the damage is not itself the search or seizure. And the second clause of the Fourth Amendment, the warrant clause, indicates, what has long been assumed with ample support in the background and legislative history of the amendment, on which see Taylor, Two Studies in Constitutional Interpretation, pt. 1 (1969); Lasson, The History and Development of the Fourth Amendment to the United States Constitution, chs. 2, 3 (1937), that the searches and seizures to which the amendment refers are those made for purposes of law enforcement, not those incident to ordinary property disputes. It is true that statutes and, even more clearly, constitutional provisions are not cabined to the particular abuses that gave rise to the enactment. A pertinent example is that the Fourth Amendment has been extended to administrative searches of a sort not envisaged when the amendment was drafted. But it is equally true that taking a word out of context, whether a semantic or an historical context, is a frequent source of interpretive error. As a practical matter, we cannot see what is to be gained by converting every repossession by state officers and every condemnation of a house into a Fourth Amendment case.

It would mean that the Supreme Court's efforts to set limits on constitutional claims of procedural irregularities would be thwarted, because every deprivation of property without due process of law would be redescribed as a seizure of property in violation of the Fourth Amendment. We conclude that until Soldal was arrested, there was no search or seizure in the Fourth Amendment sense of those words.

[20] However devastating to the Soldals' efforts to obtain damages under federal constitutional law for damage to the trailer, this analysis does not affect Soldal's claims of false arrest. The first arrest occurred when Soldal returned the morning after the eviction to pick up his children. Had he been arrested on the street, by an officer unaware that Soldal had left his children with a friend in the trailer park, the arrest would have been based on probable cause to believe that Soldal was trespassing; for Hale had made clear to him in no uncertain terms that he was not welcome. But he was arrested at a friend's trailer home. The defendants do not argue that the arresting officer or anyone else believed that Soldal had broken into or otherwise forced his way into the trailer over the occupant's objection. He was there at the invitation of the occupant—and everyone knew this. Illinois' criminal trespass statute contains an express exception for a lessee's invitee, Ill. Rev.Stat. ch. 38, ¶ 21–3, so there is no basis for an argument that Soldal's presence in the trailer showed that he had committed a criminal trespass against Terrace Properties in order to get there. A reasonable officer would have inferred from the presence of Soldal as a guest in a tenant's home that he was not trespassing, and before making an arrest would at least have attempted to determine what Soldal was doing there, which he could easily have done by asking the tenant. When he discovered that Soldal was there at the tenant's invitation to pick up his children, he would have dropped any idea of arresting him. At least on the record before us, the arrest was not based on probable cause.

[21–23] The second arrest was just as unreasonable. The test for criminal assault is whether the defendant's conduct placed the victim in *reasonable* apprehension of an imminent battery. ¶Ill.Rev.Stat. ch. 38, ¶ 12–1(a). "Conduct" in this setting has traditionally been thought to imply a gesture, rather than just words. "Mere words" do not an assault make. *People v. Dudgeon*, 341 Ill.App. 533, 540, 94 N.E.2d 556, 560 (1950). We need not decide how much of this old saw survives in Illinois after *People v. Ferguson*, 181 Ill.App.3d 950, 130 Ill.Dec. 551, 537 N.E.2d 880 (1989), where a purely verbal threat to kick the complaining witness was held to constitute a criminal assault because the defendant was within kicking distance when he uttered the threat in what appeared to be a serious manner that made the witness think the defendant was in fact about to kick him. But all this is to one side of the present case. It has been the law for centuries that an apprehension of an imminent battery, however created, is not reasonable if the defendant's words, however otherwise threatening, expressly negative a condition required for the battery to occur. "If it were not assize-time, I would not take such language from you." *Tuberville v. Savage*, 1 Mod.Rep. 3, 86 Eng.Rep. 684 (1699). It *was* assize time, and the victim knew it. So there was no assault. No more was there one here, so far as appears from the record. Soldal invited Peterson to step outside. That is, he invited him to fight. An invitation is not a command, and a reasonable man would know this. It is as if Soldal had said, "If you were to accept my invitation to fight, I would knock your block off." Of course there may have been something in Soldal's tone, or in accompanying gestures, that intimated that Soldal would not accept a refusal of his invitation. But there is no evidence of such additional circumstances.

[24–26] The plaintiffs' false arrest claims should not have been dismissed, though what is gained by casting them in conspiracy terms eludes us, and the district judge may wish on remand to consider whether any of these conspiracy claims can be sustained. Certainly the mere fact that

Peterson filed criminal charges would not make him a conspirator with the sheriff's police. And we agree with the district judge that no basis has been presented for imposing liability on Cook County, even assuming that the sheriff, whose office is separate from the rest of the Cook County government, can be thought to make policy for the County. *Thompson v. Duke*, 882 F.2d 1180 (7th Cir.1989). So far as appears, the harassment of the Soldals was an isolated abuse of power of which the sheriff and other high officials were completely ignorant, so that the harassment cannot be imputed to the county government. The doctrine of respondeat superior has been rejected for cases under section 1983. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). The plaintiffs must show direct involvement of the policy-making level of the sheriff's office in the illegal activity of its employees. *Id.* at 694, 98 S.Ct. at 2037; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986). They have not done this. And for reasons stated earlier they also have failed to establish an entitlement to relief for the damage to the trailer. So the conspiracy to evict is out. But neither the main nor pendent counts relating to the arrests should have been dismissed, although the attempt to rope in the private complainants as conspirators seems dubious, to say the least. The judgment is therefore

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FLAUM, Circuit Judge, concurring in part and dissenting in part.

I join the majority's opinion that Soldal's false arrest claims must be remanded for trial. I also believe that his due process claim should be remanded, however, and therefore respectfully dissent as to the disposition of that claim.

I differ with the majority largely because I cannot agree that "denial of procedural rights" is a "good description of the acts of the deputy sheriffs in this case." *See supra* at 1248. The majority discusses substantive due process, and acknowledges that the damage done to the Soldals' trailer was a deprivation of property, one that raises at least a "plausible" substantive due process claim, but maintains that the Soldals' suit was not "an action so conceived." *See supra* at 1248. Even the defendants concede, however, that Soldal alleged a violation of substantive due process, *see* Brief at 2, and elsewhere in its opinion the court seems to acknowledge the same as well—*see supra* at 1245 (defendants "are accused of conspiring ... to damage the Soldals' trailer"). In my view, the Soldals' complaint should settle the matter, for it alleges that the defendants conspired to deprive them of their *substantive* due process rights by, among other things, *damaging* the trailer. *See* Complaint ¶ 31 ("Defendants ... conspired together to violate the constitutional rights of Plaintiffs by unlawfully evicting Plaintiffs, removing them from the trailer park, *and destroying their property*....") (emphasis added); *see also* ¶ 33 (explicitly alleging violation of "substantive due process"). Respectfully, these allegations do not support the majority's view that the nature of the Soldals' due process claim is procedural only.

The majority maintains that the damage to the Soldals' trailer was merely the consequence of the procedural violation, rather than an independent deprivation, but that is a neither a meaningful nor instructive distinction. An eviction order does not constitute a license to pillage the property subject to the order, and it is hard to imagine how wanton destruction inflicted during the course of an otherwise lawful eviction would be an "incidental" effect of carrying out the eviction. In my judgment, no amount of procedure could have legitimized an effort to intentionally damage the Soldals' trailer, which—reading the facts in the light most favorable to the Soldals—is what happened. As Judge Posner's factual narrative suggests, there is sufficient evidence to support an inference that the trailer park employees, aided by the actions of the sheriff's deputy, deliberately damaged the trailer. Since, as the majority recognizes, "severe damage is a partial ... but

actionable deprivation," I would remand the fourteenth amendment claim for trial.

I should also note that I do not share the majority's confidence that an unreasonable repossession conducted by state officers is not actionable under the fourth amendment. The majority fears that recognizing the Soldals' fourth amendment claim would thwart the Supreme Court's "efforts to set limits on constitutional claims of procedural irregularities . . . because every deprivation of property without due process of law would be redescribed as a seizure of property in violation of the Fourth Amendment." *Supra* at 1250. The Court, however, seems less concerned with limiting procedural due process claims, and the fourth amendment, than does the majority. As Judge Posner acknowledges, the Court left this question open in *Fuentes;* even more instructive, in *Fuentes* the Court explicitly premised its reserve on the condition that a preseizure hearing take place. *See* 407 U.S. at 96 n. 32, 92 S.Ct. at 2002 n. 32 ("once a prior hearing is required, at which the applicant for a writ must establish the probable validity of his claim for repossession, the Fourth Amendment problem may well be obviated."). The Court again declined to address whether the plaintiff had a fourth amendment claim in *Zinermon,* but did point to the fourth amendment specifically as a ground that would support a § 1983 action even if state remedies to redress a deprivation were available. *See* 110 S.Ct. at 983 & n. 12. In light of the Court's language of reservation, I am reluctant to attribute to it a position that would limit fundamental constitutional rights like those encompassed in the fourth amendment.

"The strictures of the Fourth Amendment . . . have been applied to the conduct of governmental officials in various civil activities." *O'Connor v. Ortega,* 480 U.S. 709, 714, 107 S.Ct. 1492, 1496, 94 L.Ed.2d 714 (1987) (plurality opinion). Granted, the judicial process required to make the state's seizure of property in the course of a civil proceeding comport with the fourth amendment differs from that required in a criminal investigation. *See, e.g., Murray's Lessee v. Hoboken Land and Improvement Co.,* 59 U.S. (18 How.) 272, 285, 15 L.Ed. 372 (1856); *Founding Church of Scientology v. United States,* 409 F.2d 1146, 1150 (D.C.Cir.) (Wright, J.), *cert. denied,* 396 U.S. 963, 90 S.Ct. 434, 24 L.Ed.2d 427 (1969). But that is not to say that the amendment does not impose some minimum requirements to protect citizens from unlawful intrusions in the course of civil proceedings, whether the government institutes the action directly or whether it is acting at the behest of private parties. It does. *See, e.g., Specht v. Jensen,* 832 F.2d 1516 (10th Cir.1987); *United States v. Device More or Less Labeled Theramatic,* 641 F.2d 1289 (9th Cir.1981); *United States v. Articles of Hazardous Substance,* 588 F.2d 39, 43 (4th Cir.1978); *Founding Church of Scientology, supra; Dawes v. Philadelphia Gas Commission,* 421 F.Supp. 806, 824 (E.D.Pa.1976); *Miloszewski v. Sears Roebuck & Co.,* 346 F.Supp. 119 (W.D.Mich.1972); *Laprease v. Raymours Furniture Co.,* 315 F.Supp. 716 (N.D. N.Y.1970) (three-judge court); *cf. Wyman v. James,* 400 U.S. 309, 318, 91 S.Ct. 381, 386, 27 L.Ed.2d 408 (1971) (home visits by caseworker did not violate fourth amendment because they were not unreasonable); *Benigni v. City of Hemet,* 879 F.2d 473, 477 (9th Cir.1988) (fourth amendment applies to harassing "inspections" by police of a local bar); *Harris v. City of Roseburg,* 664 F.2d 1121, 1127 (9th Cir.1981) (upholding § 1983 action when police assisted an unlawful eviction but not specifying the source of the constitutional violation).

The majority would confine operation of the fourth amendment to "law enforcement activities," a term that presumably encompasses civil proceedings instituted by the government, but not those instituted by private parties. Whether the government conducts a search or seizure for private or public ends, however, is but a factor bearing on the reasonableness of its action; it does not obviate the need to make the fourth amendment inquiry. *Cf. Ortega,* 480 U.S. at 730–31, 107 S.Ct. at 1504 (Scalia, J., concurring) (whether search is conducted by police or government employer does not affect availability of fourth amendment protection; identity of government actor is relevant only to purpose and reasonableness). In either case, the government participation is just as real. By the majority's logic, an individual the police suspect of illegality, but against whom they have an insufficient quantum of cause to arrest, or to search or seize property, is entitled to greater constitutional protection against unlawful seizures than one against whom the police harbor no suspicions at all. A suspected malfeasor would have a § 1983 action, but a completely innocent victim of a governmental invasion would not.

The Supreme Court rejected a similar approach when it held the fourth amendment applicable to administrative searches in *Camara v. Municipal Court,* 387 U.S. 523, 530–31, 87 S.Ct. 1727, 1731–32, 18 L.Ed.2d 930 (1967). The Court observed that "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior" for "even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority. . . ."; *see also Wyman,* 400 U.S. at 317, 91 S.Ct. at 386 ("one's Fourth Amendment protection subsists apart from his being suspected of criminal behavior"); *Go-Bart Co. v. United States,* 282 U.S. 344, 357, 51 S.Ct. 153, 158, 75 L.Ed. 374 (1931) (The fourth amendment "is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent. . . ."). The anomaly is particularly graphic in the majority's opinion, which affirms Soldal's § 1983 action for false arrest while denying his right to sue for the wrongful seizure of (and damage to) his trailer the day before, and where both actions stem from the same *property* dispute.

Reasonableness, which is the linchpin of the fourth amendment inquiry in all other contexts, should govern in this one as well. "A determination of the standard of reasonableness applicable to a particular class of searches requires 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Ortega,* 480 U.S. at 719, 107 S.Ct. at 1498 (quoting *United States v. Place,* 462 U.S. 696, 703, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983); *Camara,* 387 U.S. at 536–37, 87 S.Ct. at 1735). When, as here, there is no significant legitimate governmental interest at stake, the alleged government action is patently unreasonable. I agree that there is little "to be gained by turning *every* repossession by state officers into a Fourth Amendment case," but neither do we gain by completely restricting the scope of constitutional protection to cases in which the government suspects one of illegal activity. Certainly, the fourth amendment should not bar every repossession or other type of governmental seizure, but it should be applied to those that, like the one alleged here, are clearly arbitrary and unreasonable.

UNITED STATES of America, Plaintiff-Appellee,

v.

Michael SCHMIDT, Defendant-Appellant.

No. 90-1070.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 5, 1990.

Decided Jan. 30, 1991.

The government filed a proceeding to determine whether a naturalized citizen's citizenship should be revoked due to his service as an armed guard at a Nazi concentration camp. The United States District Court for the Northern District of

APPENDIX C

Minute Order Form
(rev. 3/88e)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate	CHARLES P. KOCORAS	Sitting Judge/Mag. If Other Than Assigned Judge/Mag.	
Case Number	88 C 7654	Date	November 3, 1989
Case Title	SOLDAL -v- COUNTY OF COOK et al		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☒ Judgment is entered as follows: (2) ☐ [Other docket entry:]

Pursuant to Memorandum Opinion entered this day, defendants Wittsman, Levy, Hunt, Jones, Vaid, Peterson and Giovanni's motion for summary judgment is granted and the action is dismissed as to all defendants.

(3) ☐ Filed motion of [use listing in "MOTION" box above].
(4) ☐ Brief in support of motion due _____.
(5) ☐ Answer brief to motion due _____ Reply to answer brief due _____
(6) ☐ Hearing ☐ Ruling on _____ set for _____ at _____
(7) ☐ Status hearing ☐ held ☐ continued to ☐ set for ☐ reset for _____ at _____
(8) ☐ Pretrial conference ☐ held ☐ continued to ☐ set for ☐ reset for _____ at _____
(9) ☐ Trial ☐ set for ☐ reset for _____ at _____
(10) ☐ Bench trial ☐ Jury trial ☐ Hearing held and continued to _____ at _____
(11) ☐ This case is dismissed ☐ without ☐ with prejudice and without costs ☐ by agreement ☐ pursuant to
☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a) (1) ☐ FRCP 41(a)(2)
(12) ☒ (For further detail see ☐ order on the reverse of ☒ order attached to the original minute order form.)

	No notices required.		number of notices
✓	Notices mailed by judge's staff.		date docketed
	Notified counsel by telephone.		docketing dpty. initials
	Docketing to mail notices.	NOV 3 1989	date mld notices
	Mail AO 450 form.		mailing dpty. initials
	Copy to judge/magistrate.		
	courtroom deputy's initials ✓	Date/time received in central Clerk's Office	

Document #

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EDWARD SOLDAL, MARY SOLDAL, individually and as legal guardians for JIMMY SOLDAL, ALENA SOLDAL, JOSEPH SOLDAL and JESSIE SOLDAL, Plaintiff,	)	
v.	)	No. 88 C 7654
COUNTY OF COOK, a municipal corporation, LIEUTENANT JONES, OFFICER HARITOS, OFFICER HUNT, OFFICER VAID, CAPTAIN LEVY, CHIEF WITTSMAN, OFFICER DOE, OFFICER POE, JEFFREY PETERSON, KIMBERLY GIOVANNI, MARGARET CELESKI, MARGARET HALE and TERRACE PROPERTIES, Defendants.	)	

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the court on a motion for summary judgment by Defendants Wittsman, Levy, Hunt, Jones, Vaid, Peterson and Giovanni. For the following reasons, the motion is granted and the action is dismissed as to all defendants.

BACKGROUND

This case derives from the eviction of the plaintiffs' mobile home by the owners of a trailer park and two subsequent related incidents. Plaintiffs Edward Soldal and his family have pled the facts comprising these events as having infringed their federal constitutional rights through the cooperation of various members of the Cook County Sheriff's Police. There are also various pendent state law claims.

The undisputed facts are as follows: Prior to the events giving rise to this litigation, the plaintiffs resided in a mobile home on a lot which they rented from Defendants Terrace Properties, Inc. and Margaret Hale, the manager of Willoway Terrace trailer park. However, there were disagreements over the rent due and Hale, acting on behalf of Terrace Properties, sought to evict the plaintiffs from the park.

In May, 1987, Terrace Properties and Hale filed an eviction proceeding in state court. This proceeding was dismissed on June 2, 1987.

In August of 1987, Terrace Properties and Hale filed a second eviction proceeding. The hearing date for this action was scheduled for September 22, 1987. Terrace Properties and Hale, however, did not wait for their court date.

On September 4, 1987, agents of Terrace Properties removed the plaintiffs' trailer from its lot. Hale telephoned the Cook County Sheriff's Police and requested the presence of an officer in order to stave off any disturbance arising from the eviction. Captain Jackson sent deputy sheriff O'Neill and Lieutenant Jones to the trailer park with instructions to "stand by and maintain

the peace." There apparently was a particular fear of violence arising out of the dispute because, to quote the police report, "[t]he owner of the trailor [sic] Edward Soldal, had been the subject of prior calls to the park."

When Jones arrived at the park he attempted to ascertain Hale's reason and justification for moving the plaintiffs' trailer without their consent. Hale first led Jones to believe that the eviction was being accomplished pursuant to a court order. Hale, however, could not produce an eviction notice. Instead, she told Jones that "Mr. Soldal was over four months delinquent in his rent and they were going to move the trailer off the park grounds." Jones then called headquarters and, after inquiries were made, discovered that the possession dispute was currently pending in state circuit court and the next hearing date was on the 22nd of September. Jones then informed Halet that, because there was no eviction notice, the attempted removal of the plaintiffs' trailer was merely a civil dispute in which the police could not intervene.

Deputy O'Neill, on the other hand, had proceeded to Lot 24, where agents of Terrace Properties were removing the plaintiffs' trailer. When asked by Mr. Soldal what was being done to his trailer, O'Neill responded that he was there to make sure that Soldal did not interfere with the workers, and that he was doing so pursuant to Chief Jackson's orders.

Soldal then left the scene to contact his lawyer. At this point there occurred a series of telephone conversations between Soldal's lawyer or Soldal himself and either Captain Levy or Chief Wittsman of the Sheriff's Police. In these conversations, either Wittsman or Levy at first stated that he knew nothing of deputy sheriffs being sent to Willoway Terrace, but later, apparently having checked into the matter, told Soldal's lawyer that if deputy sheriffs were indeed participating in an illegal eviction, they would be stopped and so would the eviction.

Soldal then proceeded back to the trailer site in an attempt to sign a complaint against Terrace Properties and Hale for criminal trespass. Soldal was told to discuss the matter with Lieutenant Jones who was in Willoway's office. When Jones heard that Soldal wished to file a criminal complaint, he contacted a district attorney. The attorney, however, informed Jones that all the elements of a criminal trespass were not present and, thus, no criminal charges could be brought. Accordingly, Jones explained to Soldal that he could not take his complaint.

Once the plaintiffs' trailer was dislodged from its moorings, there arose the question of what to do with it. When Jones discovered that the Willoway management intended to deposit the trailer on the shoulder of a local intersection, he explained that this would not be permitted. In response, the management made arrangements to store the trailer next door at the Arrow Paving Company.

Jones further made sure that the plaintiffs were provided with a place to stay. Arrangements were made for Soldal, his wife and four children to stay at a local motel for four nights at the Willoway Terrace's expense. Mr. Soldal, however, had made arrangements with another tenant at Willoway Terrace to let his two older children stay over night in the tenant's trailer. Before Soldal left the park that night for the motel, Hale told him that he would not be allowed back in the park. Deputy sheriff Hunt then escorted Soldal, his wife and their two youngest children to the motel; Hunt led the way in his car while the Soldals followed.

Later that evening, Soldal went to the Elk Grove Village Police Station and again attempted to file a criminal complaint, this time against Arrow Construction Company for wrongfully detaining his trailer. Deputy sheriff Vaid came to see Soldal there, but explained that he could not accept the complaint because the trailer was only being stored there for safekeeping until other arrangements could be made and not to deprive Soldal of his property. Vaid did fill out a report, however.

The following day, September 5, 1987, Soldal returned to collect his remaining children. Hale saw Soldal enter the park and immediately telephoned the Sheriff's Police to complain of a trespass. Deputy sheriff Haritos investigated the matter and arrested Soldal for criminal trespass after finding him on the property of the trailer park. At that time, Soldal made no

mention of his status as an invitee of another tenant at the park. Soldal was handcuffed and jailed for several hours before being released. The charges were subsequently dropped.

On September 9, 1987, the plaintiffs obtained an order from the state judge assigned to the pending eviction proceeding, which required Terrace Properties to return the plaintiffs' trailer to its lot. Plaintiffs were placed back on Lot 24 in accordance with this order. Plaintiffs, however, were ultimately evicted per court order in December of 1987.

The final development in the case came on October 11, 1987, when Mr. Soldal was arrested yet again, this time by sheriff's deputy Vaid. The Sheriff's Police received a call from a Jeffrey Peterson, who also was a tenant of Willoway Terrace, complaining that Soldal had hit his car. When Vaid came to the park and attempted to sort the matter out with both men, Soldal accused Peterson of lying about the incident and invited him to "step out into the street." Vaid then arrested Soldal for criminal assault after Peterson indicated he desired to press charges. This charge was also ultimately dropped.

In response to these events, the Soldals brought the instant suit in September 1988. The original complaint contained nine counts; of those nine, seven remain. Count I alleges that all the members of the Sheriff's Police who were either present at Willoway Terrace or communicated with those who were present conspired with Hale and other agents of Terrace Properties to

evict the plaintiffs illegally, thus depriving the plaintiffs of their fourth and fourteenth amendment rights. Counts II and III allege that Soldal's arrests on September 5 and October 11, 1987, constituted part of the same conspiracy and also violated Soldal's fourth amendment right to be free from unreasonable seizures. Counts V, VI and V recast the arrests of September 5th and October 11th as pendent state-law claims for false arrest and imprisonment, and for malicious prosecution. Count IX alleges a tortious conspiracy to commit these very same state torts.

Defendants Levy, Wittsman, Hunt, Jones, Vaid, Peterson and Giovanni have now moved for summary judgment on the entire complaint. While Defendants Jackson and Haritos have a motion to dismiss pending before the court, the conclusions reached on the summary judgment motion make it unnecessary to address this second motion.

DISCUSSION

I. Legal Standard

Summary judgment is appropriate if the pleadings, answers to interrogatories, admissions, affidavits and other materials show "that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is one which might effect the outcome of the suit under applicable law. Anderson v. Liberty

Lobby, Inc., 477 U.S. 242, 248 (1986). No genuine issue exists "unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Id. at 249. Summary judgment may be granted if the evidence is merely colorable or is not significantly probative. Id. at 249-50.

When a properly supported motion for summary judgment has been made, the opposing party "must set forth specific facts showing that there is a genuine issue for trial." Id. The opposing party is entitled to the benefit of all favorable inferences which can reasonably be drawn from the underlying facts; however, only reasonable inferences will be drawn, not every conceivable inference. DeValk Lincoln Mercury, Inc. v. Ford Motor Co., 811 F.2d 326, 329 (7th Cir. 1987).

II. Timeliness of the Motion

Plaintiffs first argue that the defendants' motion is premature because the plaintiffs have not yet taken any discovery. They argue that this lack of discovery is particularly harmful in a conspiracy case such as this one, where the key pieces of evidence tending to show that there was a conspiracy are in the hands of the alleged co-conspirators. And indeed, the general rule is that a party should usually be allowed to conduct discovery before being required to respond to a motion for summary judgment. See American Nurses Ass'n v. State of Illinois, 783 F.2d 716, 729 (7th Cir. 1986).

As defendants point out, however, this is by no means always the case. As the Seventh Circuit stated in American Nurses, the only case upon which the plaintiffs rely, there is no absolute right to discovery and a defendant may move for summary judgment at any time. Id. Moreover, it is particularly appropriate to deny discovery when the existing record demonstrates that the requested discovery is not likely to produce the facts necessary to defeat the motion.. E.g., Colan v. Prudential-Bach Securities, Inc., 577 F. Supp. 1074, 1084 (N.D. Ill. 1983). See also Paul Kadir, Inc. v. Sony Corp. of Am., 694 F.2d 1017, 1029-30 (5th Cir. 1983) (Rule 56(f) request properly denied when additional discovery is unlikely to produce necessary facts). Further, "[a] 'bare assertion' that the evidence supporting a plaintiff's allegations is in the hands of the defendant is insufficient to justify a denial of a motion for summary judgment under rule 56(f)." Contemporary Mission, Inc. v. United States Postal Service, 648 F.2d 97, 107 (2d Cir. 1981).

Applying these principles to this case, it is evident that the plaintiffs are not entitled to more time for discovery. First, the plaintiffs have not properly moved this court for an extension of discovery under Rule 56(f). To properly raise such a motion, the party opposing the motion must present an affidavit stating the reasons why his own testimony cannot raise genuine issues with respect to the facts alleged in the complaint. The

plaintiffs, however, have neither formally moved pursuant to Rule 56(f), nor filed an affidavit.

Second, the plaintiffs have already had ample time in which to obtain at least some evidence in support of their conspiracy claim. Although the plaintiffs' counsel points to the many other pressing matters before him, the fact is that absolutely no discovery has been taken to date. This, moreover, is in spite of the fact that the plaintiffs have known the nature of the defendants' motion for summary judgment since mid-August.

Finally, the plaintiffs provide no basis for the court to conclude that discovery would do the plaintiffs any good at this point. Aside from their "bare assertion" that the evidence lies with the defendants, which, as stated above, is patently insufficient, the only specific piece of discovery the plaintiffs mention is their desire to depose Captain Jackson because he was a "central figure" in the conspiracy. However, the only evidence linking Jackson to the case is the order he gave to deputy sheriff O'Neill to keep the peace during the events of September 4, 1987. Nothing at all indicates that Jackson was in any other way involved in the matter, nor do plaintiffs provide the court with any reason for believing Jackson to be so involved. The plaintiffs' proposed discovery at this juncture, therefore, would be nothing more than a frantic fishing expedition. Although such a liberal approach to discovery might be appropriate under Rule 26 discovery, a more specific need must be shown under Rule

56(f). See First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 298 (1968) ("discovery obtainable under Rule 56(f) to oppose a motion for summary judgment would normally be less extensive in scope than the general discovery obtainable under Rule 26").

III. Merits

The seven remaining counts in the plaintiffs' complaint fall into four groups. First, Count I, alleging fourth and fourteenth amendment violations based on the events of September 4, 1987, is in a class by itself because the existence of a conspiracy between the public and private parties is necessary to the very survival of the constitutional violations alleged within it. Second, Counts II and III, alleging fourth amendment violations with respect to Soldal's subsequent arrests, fall into a separate category in that they allege constitutional violations which do not depend on the existence of a conspiracy as to the public defendants, although a conspiracy is necessary to hold the private defendants liable. Third, Counts V, VI and VII, alleging pendent state tort claims of false arrest and imprisonment and malicious prosecution with respect to the arrests, raise very similar issues and, thus, will be discussed together. And fourth, Count IX, alleging a conspiracy to commit these very same state torts, like Count I, warrants a separate discussion.

A. Count I

Both sides appear to be slightly confused over the role that the plaintiff's conspiracy allegation plays in the constitutional claims contained in Count I. The fact is that a proven conspiracy between the public and private defendants is absolutely essential to the survival of Count I. Without a conspiracy, there is no state action and, thus, no implication of either the fourth or the fourteenth amendments.

In addition to 42 U.S.C. § 1983's requirement that the defendants have acted "under color of state law," both the fourteenth amendment and the fourth amendment, as applied to the states through the fourteenth amendment, have independent state action requirements. See, e.g., Rendell-Baker v. Kohl, 457 U.S. 830, 837 (1982) (state action required under fourteenth amendment's due process clause); United States v. Jacobsen, 466 U.S. 109, 113 (1984) (no violation of fourth amendment by purely private action). Without state action, therefore, there can be no infringement of these constitutional guarantees.

In this case, the actual eviction -- and thus the constitutional deprivations or injuries complained of -- were carried out by Hale and agents of Terrace Properties. While the plaintiffs claim that the Sheriff's Police participated in the eviction, by participation, they mean either through the alleged conspiracy, or because the police had a constitutionally-based legal duty to stop the eviction and did not. The second of these

two potential sources for state action will be examined first because the plaintiff's belief in a conspiracy in large measure stems from their position that the sheriff's police failed to intervene in what they knew was an illegal eviction.

The general rule is that there is no constitutional right to state services of whatever type. As the Supreme Court has recently stated: "[O]ur cases have recognized that the Due Process clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." DeShaney v. Winnebago County Dep't of Social Serv., 109 S. Ct. 998, 1003 (1989). In DeShaney, the Court made it clear that the only exception to this rule is "that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and well-being." Id. at 1005. Writing for the Court, Justice Renquist explained that this "affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." Id. at 1006. That state law may have created such a duty to act is irrelevant to the constitutional analysis. Id. at 1006-07.

Applying these principles to this case, it is obvious that the Sheriff's Police were under no federal constitutional obligation to stop the eviction. The requisite custody exception is wholly inapposite and the general rule, therefore, applies.

This leaves the alleged conspiracy as a source for state action. And while a state-law obligation to act may have been irrelevant for providing a direct constitutional duty to act under DeShaney, such a duty could provide circumstantial evidence of a conspiracy between the Sheriff's Police and the private defendants. To wit, if the Terrace Properties defendants were clearly committing a criminal trespass, why did the members of the Sheriff's Police who were present -- and who were called to the scene by the evicting defendants -- stand idly by and do nothing? A reasonable inference would be that they conspired with the private parties not to act.

The Sheriff's Police defendants, however, correctly point out that they were under no state-law duty to stop the eviction, and in fact were under an opposite duty to not intervene on either side unless some other infringement of the criminal code was committed. The underlying dispute in this case was one over possession of real property. The exclusive way to determine rightful possession is through the procedures provided in the Forcible Entry and Detainer Act, Ill. Rev. Stat. ch. 110, ¶¶ 9-101 to 9-321 (1987). These procedures, however, are wholly civil in nature. Thus, while ¶ 9-101 forbids a forcible entry by a

landlord, the tenant's sole remedy, absent the landlord's transgression of some provision of the criminal law, is to bring a restoration action under ¶ 9-102 of the Act. Indeed, the Illinois Appellate Court has explicitly held that a criminal trespass arrest and prosecution cannot be used as a means to determine the right to possession. People v. Evans, 163 Ill. App. 3d 561, 516 N.E.2d 817 (1st Dist. 1987).

This exclusivity rule applied in this case. The possession dispute between Terrace Properties and the Soldals was pending in the Circuit Court of Cook County on September 4, 1987. Thus, rightful possession was legally undetermined at that point. Given this fact, it was a legal impossibility for either party to commit a criminal trespass on the lot in question. Although Terrace Properties and Hale were likely guilty of a forcible entry on September 4, 1987 (indeed, the state court so found on September 9, 1987), this was not a matter for the Sheriff's Police.

In sum, the Sheriff's Police were under no duty of any kind to intervene on September 4, 1987. Thus, their failure to stop the eviction cannot constitute direct evidence of a constitutional deprivation, nor can it constitute evidence of a conspiracy between the public and private defendants which would thereby make the public defendants participants in the eviction.

It therefore remains to address the other potential evidence of a conspiracy to determine whether an issue of fact his been

sufficiently raised by the plaintiffs, who have not submitted any affidavits but, instead, have chosen to rely solely upon Mr. Soldal's deposition testimony. When this evidence is examined, however, it is clear that the plaintiffs have failed to raise a genuine issue over a conspiracy.

In addressing this issue, it is necessary to understand that a conspiracy among the Sheriff's Police alone does not solve the state action problem. If the various members of the Sheriff's Police did in fact conspire amongst themselves to not stop the eviction, there would still be no state action because no individual officer actually helped in the eviction. Thus, evidence of sheriff's police communicating with each other is not helpful to the plaintiffs, who must prove the existence of a conspiracy between the public and the private defendants.

In an attempt to show such a conspiracy, the plaintiffs rely on essentially three pieces of evidence: (1) that Chief Wittsman and Captain Levy were told of the activities of the deputies and attempted to conceal and refused to stop the actions of these deputies; (2) that Lieutenant Jones actively participated in the eviction by making arrangements with Hale as to storing the trailer and putting the Soldals up for the night; (3) and that Sergeant Hunt participated in the eviction by escorting the Soldals to their motel. However, the deposition testimony supporting this evidence does nothing to show an agreement between the Sheriff's Police defendants and the Terrace

Properties defendants to violate the Soldals' constitutional rights.

First, nothing in the testimony of the conversations with Wittsman and/or Levy indicates that they concealed anything or refused to stop illegal activity by sheriff's deputies. Soldal testified in his deposition that either Wittsman or Levy told Soldal and his lawyer that he was unaware that deputies were on the scene. There is no evidence of concealment here. Soldal goes onto testify that once the matter was checked into, either Wittsman or Levy assured his lawyer that any illegal conduct on the part of the deputies would be stopped. There is no evidence of a refusal to stop illegal activity here. With respect to the actual failure to stop illegal activity on the part of the sheriff's deputies present, as stated before, there was no illegal activity because there was no duty to act. Further, there is no allegation that either Wittsman or Levy spoke to the Terrace Properties defendants. Thus, there is no public-private link that can be inferred from this evidence.

Second, the testimony and the police report concerning the activities of Lieutenant Jones also fail to show a public-private conspiracy; indeed this evidence tends to negate the presence of a conspiracy. The undisputed facts show that Jones spent a good deal of time on September 4, 1987 with Hale, the manager of Willoway Terrace. Thus, a public-private link is present here. But the substance of the communications shows that, far from

conspiring with Hale to evict the Soldals, Jones was simply doing his best to make certain they were treated fairly by Hale and Terrace Properties. As stated earlier, Jones could not have intervened on the Soldals' behalf under the circumstances; even though Terrace Properties had no court order for their action, it still did not constitute criminal trespass -- only a civil wrong. Thus, the fact that Jones made sure the trailer was stored safely instead of left on the shoulder of the road and that the Soldals had a four-night pre-paid stay in a motel are completely inapposite to a conspiracy to deprive the Soldals of their property.

Third, the testimony concerning Hunt's having escorted the Soldals to the motel by leading the way is irrelevant to the alleged conspiracy. There certainly is no allegation that the Soldals were forced to stay in the motel or that Hale wished the Soldals to be escorted to the motel.

Fourth, although the plaintiffs do not explicitly argue the point in their response, their factual statements highlight Jones's and, later, deputy sheriff Vaid's refusal to take Mr. Soldal's complaints. One could argue that these refusals constitute evidence of a conspiracy by showing an unjustified protection of a co-conspirator. The circumstances of these refusals do not bear this conclusion out, however. To begin with, only the first complaint was directed at Hale and Terrace Properties. The second complaint was directed at the neighboring

construction company that had agreed to store the Soldal's trailer for safekeeping. A refusal to accept this complaint obviously could not be relevant to a conspiracy between the Sheriff's Police and the Terrace Properties defendants because Arrow Paving is not an alleged co-conspirator. Moreover, Jones had no choice but to refuse the first complaint: the district attorney had informed Jones that the elements of criminal trespass were not all present. This was not a surprising conclusion in light of this court's earlier discussion of the legal effect of the ongoing dispute in state court over the right of possession.

Perhaps the only piece of concrete evidence that supports the conspiracy concept at all is that Hale invoked the aid of the Sheriff's Police before beginning the eviction. But the Seventh Circuit has clearly indicated that "[a] private person does not conspire with a state official merely by invoking an exercise of the state official's authority." Tarkowski v. Koert-Barlett Realty Co., 644 F.2d 1204, 1208 (7th Cir. 1980).

In short, there is absolutely no evidence supporting a conspiracy between the sheriff's police and the Terrace Properties defendants. Because of this, all the constitutional allegations in Count I must fail due to a lack of state involvement. Moreover, without the presence of state action, Count I, of necessity, must also fail as to the private

defendants. Count I, therefore, must be dismissed in its entirety.

B. Counts II and III

Counts II and III allege fourth amendment violations as to all defendants. Count II alleges that the September 5th arrest of Soldal for criminal trespass was an unreasonable seizure because he was arrested without probable cause. Count III alleges the same legal conclusion with respect to Soldal's arrest for criminal assault on October 11, 1987.

At the outset, a brief word is in order as to how the conspiracy allegations and the conclusion reached in Part IIIA of this opinion fit into Counts II and III. To start with, the lack of a conspiracy between the public and private defendants as discussed in Part A of this opinion necessarily negates a violation of the fourth amendment by Hale or Terrace Properties. Again, without the public-private conspiracy, these private parties, who did not arrest or "seize" Soldal, cannot have violated the fourth amendment. This also goes for Defendants Peterson and Giovanni, who were never tied into the conspiracy in any case. The same, however, cannot be said for the arresting officers. Regardless of a conspiracy, these officers acted under color of state law and thus constituted state action when they made these arrests. The merits of Counts II and III, therefore, must be reached. Moreover, it should also be noted that Part

IIIA of this opinion did not reject the possibility of a conspiracy amongst the Sheriff's Police, which could expand this potential fourth amendment liability to officers who did not actually make the arrests. Notwithstanding, given the conclusions reached as to the merits of the remaining issues in the case, the existence of this "second" potential conspiracy need not be reached.

The law applicable to both Counts II and III is the same: it is well-established that an arrest based upon probable cause is a reasonable seizure under the fourth amendment. Moreover, the Seventh Circuit has glossed the meaning of probable cause in a way that is directly applicable to this case. In McKinney v. George, 726 F.2d 1183 (7th Cir. 1984), the court stated:

> If policemen arrest a person on the basis of a private citizen's complaint that if true would justify the arrest, and they reasonably believe it is true, they cannot be held liable for a violation of the Constitution merely because it later turns out that the complaint was unfounded. . . . If the police have probable cause, the arrest is lawful; and they have probable cause if they believe, with reason, that their informant was telling the truth.

Id. at 1187. Although the issue of whether or not there was reasonable suspicion or reasonable belief, i.e., probable cause, is usually a question for the jury in a civil action under § 1983, the Seventh Circuit has long held that, '"[w]here there

is no conflict in evidence, the court may make its own legal determination of probable cause.'" Llaguno v. Mingey, 739 F.2d 1186, 1190 (7th Cir. 1984) (quoting Garris v. Rowland, 678 F.2d 1264, 1268 (5th Cir.), cert. denied, 459 U.S. 864 (1982)). The rule dates from the Seventh Circuit's decision in Banish v. Locks, 414 F.2d 638 (7th Cir. 1969), and is based on the pre-existing rule as it applies to the tort of false arrest and imprisonment, where probable cause is also a defense. Id. at 641.

1. Count II -- September 5, 1987

On September 5, 1987, the Sheriff's Police were called to Willoway Terrace by Hale to investigate a criminal trespass. Deputy sheriff Haritos arrested Soldal for that crime after Soldal was found on the grounds in another tenant's trailer with his two older children. Deputy sheriff Hunt was also present. Hale explained that Soldal had been evicted the day before and given notice not to return; she also expressed a desire to press charges and signed a complaint to this effect.

Applying the rules articulated above, it is apparent that Haritos had probable cause to arrest Soldal. The elements of criminal trespass are, in relevant part: (1) entering upon the land of another, (2) "after receiving notice from the owner or occupant that such entry is forbidden . . . ." Ill. Rev. Stat. ch. 38, ¶ 21-3(a) (1987). Based on what Haritos saw himself and

the information he received from Hale, these elements were met and the arrest was appropriate.

The plaintiffs nonetheless argue that the arrest was unreasonable because there was no probable cause to believe there had been a criminal trespass. Specifically, they argue: (1) Soldal had as much right to be on the property as Terrace Properties because the possession issue had not yet been resolved by the state trial court (in other words, the same reason that criminal trespass charges could not be filed against Hale and Terrace Properties on the preceeding day); and (2) Soldal was immune from criminal trespass at the time because he was the invitee of another tenant who had put up Soldal's two older children for the night. These arguments must both fail, however.

The first argument is not even applicable to Soldal's arrest. As the defendants correctly point out, Soldal was not arrested for entering the lot over which there was a possessory dispute; nor does Soldal contend that he was attempting to reach this lot. Instead, Soldal admits he entered the park solely to visit another tenant, and that he did so after he had been given notice to stay away.

The second argument, though relevant to the merits of the criminal trespass issue, do not negate probable cause. The key here is what deputy sheriff Haritos knew at the time he made the arrest. And while Soldal's status as an invitee of a Willoway Terrace tenant would certainly have constituted a valid defense

to a charge of criminal trespass, there is no indication that Haritos knew of this status at the time. In this regard, Soldal admits he said nothing to Haritos at the time. Of course, the fact that Haritos found Soldal in another's trailer was related to his potential status as an invitee, but Haritos had no knowledge of whether he entered the park as an invitee or just what the circumstances were. The fourth amendment does not require every arrest to be correct, only supported by probable cause.

In short, while there was some indication that Soldal may not have been engaged in criminal trespass on September 5, 1987, it was not sufficient to destroy the initial probable cause to arrest. As the McKinney court made clear, whether the arrest was actually made upon a person guilty of the charge is irrelevant to the fourth amendment; the test is whether, at that moment, there was reasonable suspicion to believe a crime had been committed. The arresting officers made a judgment call based on the facts before them and this court finds that judgment to have been reasonable.

2. Assault - October 11, 1987

On October 11, 1987, the sheriff's police were called by Jeffrey Robinson, who complained that Soldal -- now re-established on his lot -- had struck his car and then left the scene. Sheriff's deputy Vaid came to Willoway Terrace to

investigate the matter. After getting the two men together to discuss what had occurred, Soldal called Robinson a liar and invited him to the equivalent of trial by combat. Robinson indicated he wished to press charges for criminal assault and Vaid arrested Soldal. The charge was subsequently dropped.

Again, the undisputed facts show that there was probable cause to believe that a criminal assault had been committed. The legal standard is whether the complainant was "in reasonable apprehension of receiving a battery." Peterson explained that he considered Soldal's comments a threat and expressed a desire to press charges. Thus, Vaid was acting on Peterson's assertions as to how he felt about the challenge.

Plaintiffs argue that no reasonable basis to make the arrest existed because it should have been evident to Vaid that Peterson was not in reasonable apprehension of being hit. Apparently, the plaintiffs believe that Soldal would have had to move toward Peterson before the arrest could be considered reasonable.

Plaintiffs, however, again confuse the merits of the assault charge with the probable cause issue. Soldal admits that he called Peterson a liar and invited him to fight. He further admits that their argument was "heated." Vaid believed Peterson when he said he felt threatened by this conduct. Under these circumstances, the court finds Vaid's belief to have been reasonable.

Because probable cause existed as to both arrests, Counts II and III must also be dismissed.

C. Counts V, VI and VII - False Arrest and Imprisonment and Malicious Prosecution

Counts V, VI and VII recharacterize Soldal's arrests on September 5 and October 11, 1987, as pendent tort claims for false arrest and imprisonment, and for malicious prosecution. These counts, however, must be dismissed as well.

One element in both of these tort actions is that the arrest or legal proceeding have been instituted without probable cause. See e.g., Friedman v. Village of Skokie, 763 F.2d 236, 239 (7th Cir. 1985) (false arrest); Ritchey v. Makin, 71 Ill. 2d 470, 475, 376 N.E.2d 991, 993 (1978) (malicious prosecution). Given the court's findings of probable cause with respect to both arrests at issue in this case, Counts V, VI an VII must be dismissed as to all defendants.

D. Count IX - Conspiracy to Commit State Torts

Count IX alleges a conspiracy among all the named defendants to falsely arrest and imprison and maliciously prosecute the plaintiffs. Without even addressing any remaining conspiracy which may potentially exist after Part IIIA of this opinion, this count fails as a matter of law.

This court recently concluded that Illinois does not recognize a tort of conspiracy to commit a tort. Belkow v. Celotex Corp., No. 89 C 3049, slip op. at 9 (N.D. Ill. Sept. 20, 1989). In so holding, the court relied on the reasoning of the Seventh Circuit in Cenco, Inc. v. Seidman & Seidman, 686 F.2d 449, 453 (7th Cir.), cert. denied, 459 U.S. 880 (1982), where the court stated: [T]here is no basis in common law thinking for a tort of conspiracy to commit a tort. If there is a conspiracy and it fails, there is no injury and hence no tort liability; if it succeeds, the damages are fully recoverable in an action on the underlying tort." The ruling in Belkow governs this issue and Count IX must be dismissed.

For all of the foregoing reasons, the moving defendants' motion for summary judgment is granted in full and the action is dismissed as to all defendants.

Charles P. Kocoras
Charles P. Kocoras
United States District Judge

Dated: NOV 3 98

AO 450 (Rev. 5/85) Judgment in a Civil Case ⊕

United States District Court

NORTHERN DISTRICT OF ILLINOIS
Eastern Division

EDWARD SOLDAL et al

V.

COUNTY OF COOK et al

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 88 C 7654
Judge Kocoras

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to Memorandum Opinion entered this day, defendants Wittsman, Levy, Hunt, Jones, Vaid, Peterson and Giovannie's motion for summary judgment is granted and the action is dismissed as to all defendants.

3 November 1989
Date

H. STUART CUNNINGHAM
Clerk

(By) Deputy Clerk

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